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In the Matter of

CERTAIN LUGGAGE PRODUCTS

ORIGINAL

Investigation No. 337-TA-243

USITC PUBLICATION 1969

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COMPLETED

United States International Trade Commission / Washington, DC 20436

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UNITED STATES INTERNATIONAL TRADE COMMISSION

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United States International Trade Commission
Washington, DC 20436

I

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the Matter of

CERTAIN LUGGAGE PRODUCTS

Investigation No. 337-TA-243

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NOTICE OF COMMISSION DECISION TO AFFIRM ADMINISTRATIVE LAW JUDGE'S INITIAL DETERMINATION FINDING NO VIOLATION OF SECTION 337 OF THE TARIFF ACT OF 1930

AGENCY: U.S. International Trade Commission.

ACTION: Determination of no violation of section 337 of the Tariff Act of 1930.

SUMMARY: The Commission has determined to affirm the initial determination (ID) of the presiding administrative law judge (ALJ) that there is no violation of section 337 in the importation and sale of certain luggage products in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Randi S. Field, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-523-0261.

SUPPLEMENTARY INFORMATION: On December 29, 1987, the presiding ALJ issued an initial determination (ID) finding that there is no violation of section 337 in the importation and domestic sale of certain luggage products which were alleged to infringe complainant's common law trademarks in the overall configuration of its luggage products. On February 13, 1987, the Commission determined to review the ALJ's ID on the issue of secondary meaning and on the issues of domestic industry and injury to the extent that such review was required by the Commission's review of the secondary meaning issue. The Commission received briefs on the issues under review and on the issues of remedy, the public interest, and bonding. Submissions were received from complainant Lenox, Inc., respondent Star Leather Products, Ltd., and the Commission investigative attorney. No submissions from the public or government agencies were received.

This action is taken under the authority of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) and sections 210.54-.56 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.54-.56).

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II

Notice of this investigation was published in the Federal Register on March 27, 1986. (51 F.R. 10580).

Copies of the Commission opinion in support of its determination, the nonconfidential version of the ALJ's ID and all other nonconfidential documents filed in connection with this investigation will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, telephone 202-523-0161. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-724-0002.

By order of the Commission.

Kenneth R. Mason
Secretary

Issued: March 27, 1987

III

INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of CERTAIN LUGGAGE PRODUCTS	)	Investigation No. 337-TA-243

Notice To All Parties

On May 28, 1987 the Commission ORDERED THAT Order No. 63 is deemed to be a recommended determination and is affirmed and adopted by the Commission and that the effective date of its Action and Order is fourteen (14) days from the service date for the Action and Order of May 29, 1987. Order No. 63 granted motions by the staff and respondent Star Leather Products Co. Ltd. to declassify portions of the confidential version of the initial determination which issued December 29, 1986. Accordingly attached herewith is the public version of the initial determination which was served on January 16, 1987 and which public version now incorporates portions of the confidential version which have been declassified pursuant to Order No. 63.

Paul J. Luckern
Paul J. Luckern
Administrative Law Judge

Issued: June 19, 1987.

IV

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the Matter of CERTAIN LUGGAGE PRODUCTS	)	Investigation No. 337-TA-243

COMMISSION ACTION AND ORDER

Background

On March 14, 1986, the Commission instituted Inv. No. 337-TA-243, Certain Luggage Products, to determine whether there is a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the importation into and sale in the United States of certain luggage product by reason of (1) common law trademark infringement, (2) trade dress misappropriation, (3) passing off, (4) false representation, (5) trademark dilution, and (6) unfair competition, the effect or tendency of which unfair acts allegedly is to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

The investigation was based on a complaint filed by complainant Lenox, Inc., (Lenox) on behalf of its division

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Hartmann Luggage Company, on February 12, 1986. The notice of investigation was published in the Federal Register on March 27, 1986.

The twelve respondents named in the notice of investigation were:

1. Pei Lin Leather Products (Pei Lin);
2. Weltyle Plastic Products Co., Ltd.;
3. Star Leather Products, Ltd. (Starco);
4. Pungkook Industrial Co., Ltd.;
5. Kingport International Corporation;
6. Pedro Companies, Inc.;
7. American Guard-It Manufacturing Company (American Guard-It);
8. Montgomery Ward & Co., Inc.;
9. Monarch Luggage Company, Inc.;
10. Dimensions Unlimited, Inc.;
11. K Mart Corporation (K Mart); and
12. Winn International Corporation.

The investigation has been terminated with respect to eight of the named respondents on the basis of consent orders or settlement agreements. The four nonsettling respondents remaining in the investigation are Pei Lin, Starco, American Guard-It, and K Mart. Starco and K Mart are active respondents. Pei Lin and American Guard-It have been found in default.

An evidentiary hearing before the presiding administrative law judge (ALJ) commenced on September 29, 1986, and concluded on October 3, 1986. Closing arguments were heard on October 30, 1986.

On December 29, 1986, the ALJ issued his final ID finding no violation of section 337. The ALJ found that there were no

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unfair acts in the importation of certain luggage products and hence no violation of section 337.

Complainant had put in issue four types of luggage products: attache cases, hanger bags, carry-on bags, and soft pullman suitcases. According to complainant, three different common law trademarks are involved because the soft pullman suitcases were alleged to have substantially the same "overall appearance" as the attaches.

The ALJ first found that testimony of complainant's witnesses and its promotional material established uncertainty as to the nature and scope of each of complainant's three alleged trademarks. The ALJ next found that although complainant has the right to use the alleged trademarks, it had not sustained its burden of establishing that the alleged common law trademarks are inherently distinctive. Nor had complainant sustained its burden of establishing secondary meaning, through either direct or circumstantial evidence.

The ALJ did find that each of the alleged common law trademarks is primarily nonfunctional and that the overall appearances of complainant's products in issue are not incapable of becoming common law trademarks because of genericness, assuming that there is evidence establishing secondary meaning. He found, however, that the alleged common

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law trademarks are of a weak nature based, inter alia, on the divergent testimony of complainant's witnesses as to what the alleged trademarks are.

Finally, the ALJ found that "if it is assumed that the alleged common law trademarks have a secondary meaning," complainant had sustained its burden in establishing a likelihood of confusion. Regarding the other alleged unfair acts, the ALJ found that complainant had not sustained its burden of proof to establish that any of the respondents had engaged in trademark dilution or passing off. The ALJ also found that complainant had offered no independent proof for its allegations of trade dress misappropriation, false representation, and unfair competition. In view of his finding that the alleged common law trademarks in issue had not acquired secondary meaning, the ALJ found that complainant had not sustained its burden of proof in establishing trade dress misappropriation, false representation, and unfair competition by any of the respondents.

The ALJ found that the accused attache cases, carry-on bags, and hanger bags have been imported into and sold in the United States. He defined the domestic industry as "complainant's facilities devoted to the exploitation of three common law trademarks covering Hartmann's A4-A9 attache cases, carry-on bags, and hanger bags." The ALJ found the domestic industry to be efficiently and economically operated.

VIII

The ALJ, noting that his injury analysis assumed the existence of unfair acts, found that complainant had provided sufficient proof of significant import penetration, lost sales, direct competition, underselling, and harm to goodwill by respondents to have met its burden of showing present substantial injury, as well as the requisite nexus between the injury suffered and the respondents' (assumed) unfair acts.

Finally, regarding tendency to substantially injure the domestic industry, the ALJ found that "the combination of confusion among customers between Hartmann luggage and Hartmann infringing imports, the lower quality of the infringing imports, the importance to Hartmann's competitiveness of maintaining its high-quality reputation, and the significant quantity of infringing luggage that has been imported into the United States relative to Hartmann's sales, [is] sufficient to establish the existence of circumstances that will result in probable future substantial injury to the industry at issue."

On January 9, 1987, complainant Lenox filed a petition for review of the ID insofar as the ALJ determined that complainant had not established common law trademarks in the overall appearances of its products at issue. On January 16, 1987, the Commission investigative attorney filed a response to complainant's petition for review. On January 21, 1987, respondent Starco also filed a response to the petition for review.

On February 13, 1987, the Commission determined to review portions of the ALJ's ID in the above-referenced investigation. Notice of that decision was published in the Federal Register on February 26, 1987 (52 Fed. Reg. 5840).

As set forth in the Federal Register notice, the Commission decided to review the following issues:

> [T]he Commission has decided to review the issue of secondary meaning and is especially interested in the weight and effect that should be given to Finding of Fact (FF) 311 of the ID and the testimony underlying FF 311. Because the Commission's review of the issue of secondary meaning may affect the ultimate disposition of the issues of industry and injury, the Commission is reviewing those issues as well, but only to the extent that such review may be required by its review of the issue of secondary meaning.

Action

Having reviewed the written submissions filed regarding the issues under review and the record in this investigation, the Commission has determined to affirm the ALJ's determination that complainant has not established the existence of common law trademarks in the overall appearances of its products at issue and, therefore, that there is no violation of section 337.

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Order

Accordingly, it is hereby ORDERED THAT --

1. The ALJ's determination that complainant has not established the existence of common law trademarks in the overall appearances of its products at issue is affirmed;

2. Investigation No. 337-TA-243 is terminated on the basis that there is no violation of section 337; and

3. The Secretary shall serve copies of the Action and Order and the Commission Opinion issued in connection therewith upon each party of record in this investigation and upon the Department of Health and [illegible] Services, the Department of Justice, the Federal Trade Commission, and the U.S. Customs Service and publish notice thereof in the Federal Register.

By order of the Commission.

Kenneth R. Mason
Secretary

Issued: March 27, 1987

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XI

PUBLIC VERSION

In the Matter of CERTAIN LUGGAGE PRODUCTS	)	Investigation No. 337-TA-243

VIEWS OF VICE CHAIRMAN BRUNSDALE, COMMISSIONER ECKES, COMMISSIONER LODWICK, AND COMMISSIONER ROHR [1]

I. PROCEDURAL HISTORY

On February 12, 1986, Lenox, Incorporated (Lenox) filed a complaint with the Commission on behalf of its division Hartmann Luggage Company (Hartmann) alleging unfair acts and unfair methods of competition in the importation of four types of luggage products: attache cases, hanger bags, carry-on bags, and soft pullman suitcases. On March 14, 1986, the Commission instituted this investigation and issued a notice of investigation covering six unfair acts: (1) common law trademark infringement, (2) trade dress misappropriation, (3) passing off, (4) false representation, (5) trademark dilution, and (6) unfair competition.

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[1] The following abbreviations are used in this opinion:
ALJ = Administrative Law Judge
IA = Commission Investigative Attorney
ID = Initial Determination of the ALJ
FF = Finding of Fact
Tr.= Transcript of the Evidentiary Hearing
CX = Complainant's Exhibit
CPX= Complainant's Physical Exhibit

On December 29, 1986, the ALJ issued his final ID finding no unfair acts in the importation of certain luggage products and, hence, no violation of section 337. The ALJ first found that testimony of complainant's witnesses and its promotional material established uncertainty as to the nature and scope of each of complainant's alleged trademarks. The ALJ next found that although complainant had the right to use the alleged trademarks, it had not sustained its burden of establishing that the alleged common law trademarks are inherently distinctive. Nor had complainant sustained its burden of establishing secondary meaning, through either direct or circumstantial evidence.

The ALJ did find that each of the alleged common law trademarks is primarily nonfunctional and that the overall appearances of complainant's products in issue are not incapable of becoming common law trademarks because of genericness, assuming that there is evidence establishing secondary meaning. He also found, however, that the alleged common law trademarks are of a weak nature based, inter alia, on the divergent testimony of complainant's witnesses as to what the alleged trademarks are.

The ALJ found that "if it is assumed that the alleged common law trademarks have a secondary meaning," complainant had sustained its burden of establishing likelihood of confusion. Finally, the ALJ found that complainant had not sustained its burden of proof of establishing that any of the respondents had engaged in the other alleged unfair acts.

The ALJ found that the accused attache cases, carry-on bags, and hanger bags have been imported into and sold in the United States. He defined the domestic industry as "complainant's facilities devoted to the exploitation of three common law trademarks covering Hartmann's A4-A9 attache cases, carry-on bags, and hanger bags." The ALJ found the domestic industry to be efficiently and economically operated and, noting that his injury analysis assumed the existence of unfair acts, found that respondents' imports had the effect and tendency to destroy or substantially injure the domestic industry.

Complainant Lenox filed a petition for review of the ID insofar as the ALJ determined that complainant had not established common law trademarks in the overall appearances of its products at issue. Respondent Star Leather Products Co. Ltd. (Starco) and the IA filed replies.

On February 13, 1987, the Commission determined to review portions of the ALJ's ID. The Commission ordered review of the issue of secondary meaning and specifically requested the parties to address the weight and effect that should be given to FF 311 of the ID and the testimony underlying FF 311. The Commission also reviewed the issues of industry and injury, but only to the extent that review of those issues was required by review of the secondary meaning issue. The parties filed submissions on the issues under review as well as on remedy, the public interest, and bonding. The parties also filed their respective replies. No other submissions were received. On March 27, 1987, the Commission determined to affirm the ALJ's conclusion of no violation of section 337.

II. EFFECT OF THE COMMISSION'S DETERMINATION

The Commission has determined to affirm the ALJ's findings on secondary meaning with certain clarifications which are discussed below. The ALJ's FFs concerning the issue of secondary meaning are adopted to the extent that they are not inconsistent with this Opinion.

III. DISCUSSION

1. Common Law Trademark

Complainant put in issue four types of luggage products: (1) its model A4 and A9 attache cases, (2) its model H1 and H3 hanger bags, (3) its model C2 and C3 carry-on bags, and (4) its soft pullman suitcases. Complainant argued that the rights asserted stem from Hartmann's creation of three different trademarks in the overall appearances of the four luggage products. 2/ Complainant stated that three different common law trademarks are involved in the investigation because the soft pullman suitcases have substantially the same "overall appearance" as Hartmann attaches.

A trademark is defined at common law, as it is under the Lanham Act as: "any word, name, symbol, or device, or any combination thereof, adopted and used by a manufacturer or a merchant to identify his goods and to distinguish them from those manufactured or sold by others." 3/ A common law trademark is established and protectable upon proof that: "(1) complainant has the right to use the mark; (2) the mark is inherently distinctive or has acquired secondary meaning; (3) the mark is not primarily functional; and (4) the mark has not acquired a generic meaning." 4/ In order to obtain protection under

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2/ ID at 4. Complainant defined its common law trademarks as the three individual trade dresses defined in this investigation. Tr. at 1524.

3/ ID at 14; 1 J. McCarthy, Trademarks and Unfair Competition, § 3:1 at 103 (2d Ed. 1984) (hereinafter McCarthy).

4/ ID at 15; Certain Cube Puzzles, Inv. No. 337-TA-112, USITC Pub. 1334 at 7 (1983) (Cube Puzzles).

section 337, a common law trademark must meet those criteria. [5] The U.S. Court of Appeals for the Federal Circuit and the Commission have recognized that a common law trademark may exist in the overall appearance of a product. [6]

In establishing whether complainant had established its alleged common law trademarks, the ALJ first attempted to identify the features of complainant's alleged marks. [7] Complainant's counsel defined the common law trademark of the Hartmann attache cases involved in this investigation as consisting of the overall appearance of the products and including the "dominant" elements of (1) the figure-8 saddle handle with a raised ridge in the center of the handle, (2) the lock straps extending from the handle and going around the corners of the attache case and being secured at the sides,

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5/ Cube Puzzles, USITC Pub. 1334 at 7.

6/ See, e.g., Certain Vertical Milling Machines and Parts, Attachments, and Accessories Thereto, Inv. No. 337-TA-133, USITC Pub. 1512 (1984) (Vertical Milling Machines), aff'd, Textron, Inc. v. U.S. Int'l Trade Commission, 753 F.2d 1019, 224 U.S.P.Q. 625 (Fed. Cir. 1985) (Textron). In Vertical Milling Machines, the Commission found that no common law trademark existed in the product in issue because complainant failed to show that the product's overall appearance was inherently distinctive or had acquired secondary meaning. The Federal Circuit agreed that complainant had not shown that the product design was entitled to common law trademark protection, but arrived at this result by applying the doctrine of functionality. Textron, 753 F.2d at 1024.

7/ The testimony underlying FF 311, which is specifically referred to in the Commission's notice of review, relates solely to attache cases expressly and soft pullman cases by implication. Accordingly, our review is primarily directed at examining whether complainant's alleged mark in the overall appearance of its attache cases and pullman cases has attained secondary meaning.

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and (3) the square shape of the product. [8] Complainant's counsel also stated that in 1983 Hartmann designed the soft pullman suitcases using the "overall appearance and dominant elements of the attache case and the hard suitcases of the International series, namely the same figure-8 saddle handle with a raised ridge, the lock flaps and the square look. . . ." [9]

Despite counsel's description of complainant's alleged common law trademarks, the ALJ found that testimony from complainant's witnesses and Hartmann's promotional material established uncertainty as to the nature and scope of complainant's alleged trademarks. [10] Complainant, in turn, contended that the ALJ erroneously required complainant to set out a list of specific features for the products to define and "limit the common law trademarks to these features," rather than the overall appearances of the products. [11] Complainant asserted that in AmBrit, Inc. v. Kraft, Inc., 805 F.2d 974, 978 (11th Cir. 1986), the Eleventh Circuit defined the trade dress at issue to be the wrapper and packaging of plaintiff's Klondike bar noting that a protectable trade dress involves "the total image of the product and may include such features such as size, shape, color or color combinations, texture . . . ." [12]

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[8] ID at 4-5. Complainant's counsel did not define "dominant." The ALJ relied on the dictionary definition of "commanding, controlling, or prevailing over all others." ID at 4 n.4.

[9] ID at 14. The various features claimed by complainant's counsel to be included in the overall appearance of the four types of luggage items at issue in this investigation are described in paragraphs 17-22 of the complaint.

[10] ID at 5-14.

[11] Complainant's Petition for Review of Initial Determination (Petition) at 18.

Although, as asserted by complainant, a protectable trade dress may include "the total image of the product," the AmBrit case also makes clear that the features of the trade dress were explicitly identified and relied upon by the U.S. District Court in reaching the conclusion that there had been infringement. [13] Accordingly, the decision in AmBrit was based on a precise identification of trade dress features. [14] In contrast, complainant's counsel persists in defining complainant's trade dress in general terms such as "overall appearance." Moreover, complainant's witnesses could not agree on whether color, color coordination, quality, texture, and various design details of the alleged marks were part of the allegedly distinctive Hartmann look. [15]

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[12] Supplement to Complainant's Petition for Review at 2.

[13] 805 F.2d at 979-80.

[14] In finding that the trade dress in that case was inherently distinctive, the Eleventh Circuit agreed with the district court that "the Klondike wrapper with its square size, bright coloring, pebbled texture, polar bear and sunburst images, and distinctive style of printing is a 'complex composite of size, color, texture, and graphics . . . . [creating] a distinctive visual impression.'" 805 F.2d at 979-80. The court also referred to plaintiff's trade dress as a unique combination of elements. Id. at 981 and n.25.

The court added that although it described the elements of the wrappers that are similar, it was not comparing individual elements. 805 F.2d at 984 n.48. Rather, it was merely explaining why the overall impression of each wrapper was similar.

[15] ID at 5-14; Reply Brief of the Commission Investigative Staff on Issues of Secondary Meaning and Remedy (Staff's Reply Brief) at 1-2.

Contrary to complainant's assertion, the ALJ's analysis of whether complainant had established common law trademarks in the overall appearance of its luggage products properly began with a definition of the alleged marks. The ALJ analyzed inconsistent and sometimes contradictory testimony to determine what features in combination make up the overall appearances of the alleged trademarks.

After attempting to define the nature and scope of complainant's alleged marks, the ALJ concluded, *inter alia*, [16] that complainant had not sustained its burden of establishing that the alleged common law trademarks were *inherently* distinctive. [17] Therefore, the burden was on complainant to prove that the trademarks had become distinctive, *i.e.*, they had acquired secondary meaning in the minds of the consuming public.

4. Secondary Meaning

Secondary meaning is a mental association in the buyers' mind between the alleged mark and a single source of the product bearing the mark. [18] Proof of secondary meaning is a question of fact which must be established by a preponderance of the evidence. [19] A preponderance of the evidence has been defined as:

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[16] The ALJ also found that complainant had the right to use the alleged common law trademarks, ID at 16, that complainant's alleged marks were nonfunctional, and that the overall appearance of complainant's products in issue were not incapable of becoming common law trademarks, i.e., the alleged marks had not acquired a generic meaning. ID at 65-66.

[17] ID at 22-27.

[18] McCarthy, § 15:2 at 659.

[19] McCarthy, § 15:11 at 686.

> Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. . . . The word 'preponderance' means something more than 'weight'; it denotes a superiority of weight, or outweighing. . . . [20]

Secondary meaning can be established by direct and circumstantial evidence. [21] Direct evidence is that evidence which directly proves the matter in issue, here, the relevant state of mind of buyers. It may be in the form of the testimony of random buyers in court or "quasi-direct evidence" by means of professionally conducted consumer surveys. Circumstantial evidence allows the trier of fact to draw inferences from buyers' exposure to the mark. It can consist of advertising, length of use, exclusivity of use, and sales volume. [22] Moreover, the Commission may draw inferences of secondary meaning from deliberate and close copying of the alleged mark, particularly if the mark is a very strong one. The existence of intentional close copying alone, however, is insufficient to establish secondary meaning. [23] Generally, the less distinctive the alleged mark, the greater the evidentiary burden to establish secondary meaning. [24]

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[20] Black's Law Dictionary at 1064 (rev. 5th ed. 1979).

[21] McCarthy, § 15:10 at 684-85.

[22] Vertical Milling Machines, USITC Pub. 1512 at 13-14; McCarthy, § 15:10 at 685.

[23] Vertical Milling Machines, USITC Pub. 1512 at 14; Certain Vacuum Bottles and Components Thereof, Inv. No. 337-TA-108, USITC Pub. 1305 at 15-19 (1982) (Vacuum Bottles).

[24] ID at 27-28; McCarthy, § 15:10 at 683.

(1) The Strength of the Alleged Common Law Trademarks

The ALJ found that the alleged common law trademarks are of a weak nature based upon the divergent testimony of complainant's witnesses as to what the alleged common law trademarks are. [25] The ALJ added that "the weak nature is shown by the inherent potential of each of the marks at the time of first use, see [ID at] pp. 23-26, and actual customer recognition of the alleged marks at the time the marks were asserted in this investigation. See supra at 27-53." [26] By concluding that complainant's alleged common law trademarks in the overall configuration of its luggage products were of a weak nature, the ALJ required strong evidence of secondary meaning.

Complainant argues that certain of the ALJ's FFs (viz., 37, 42, 121, 124, 170, and 311) established that the marks were strong for the purpose of evaluating secondary meaning and that the ALJ failed to consider his own FFs. [27] We have examined the FFs cited by complainant to ascertain whether they are inconsistent with the ALJ's conclusion that the overall appearances of complainant's marks are of a weak nature. For example, FF 42 enumerates various features of the Hartmann attache that were thought by Ira Katz, a former president of Hartmann who now does some consulting for complainant Lenox, [28/] to be "recognized instantly as being different." [29/] Similar observations can be made with respect to FF 121 which relates to the soft pullman. [30/]

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[25] ID at 4-14, 67.

[26] ID at 67 (citing McCarthy, § 11.25). The ALJ used what has been termed the "two-prong test" for determining the strength of complainant's alleged marks. The strength of the mark is determined by weighing two factors: "(1) the placement of the mark on the spectrum of marks; and (2) the marketplace recognition value of the mark." McCarthy, § 11.25 at 509. The test utilizes a time scale to distinguish two separate dimensions of strength. The first inquiry focuses on the "inherent potential of the term at the time of its first use." Id. at 510. The second inquiry focuses on "the actual customer recognition value of the mark at the time registration is sought or at the time the mark is asserted in litigation to prevent another's use." Id.

[27] Complainant's Brief on Review of Initial Determination (Complainant's Review Brief) at 24-26.

As a preliminary matter, we note that the FFs 37, 42, 121, and 124 (the Katz FFs) are based on the deposition of Ira Katz. The ALJ concluded that Mr. Katz is an interested party and, therefore, his "testimony is not controlling." [31/] We find that Mr. Katz's statements with respect to matters such as the uniqueness of the alleged "Hartmann look" are self-serving

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[28/] ID at 101; FF 35. The Katz family bought the Hartmann Luggage Company in 1955 and Ira Katz became company president in 1957. ID at 7. Mr. Katz introduced the alleged attache common law trademark in the early 1960's. ID at 6. Although Ira Katz sold Hartmann to complainant in 1983, he remained for two additional years to train his successor. ID at 7.

[29/] ID at 103.

[30/] ID at 134.

[31/] ID at 57. See Plastilite Corp. v. Kassnar Imports, 508 F.2d 824, 184 U.S.P.Q. 348, 350 (C.C.P.A. 1975) (in determining whether mark has become distinctive, it is association of mark with a particular source by ultimate consumers which is to be measured--not party's intent in adopting alleged mark); In re David Crystal, Inc., 132 U.S.P.Q. 1, 2 (C.C.P.A. 1961) (affidavit of president of company given little weight because it came from an interested party). See also Certain Novelty Glasses, Inv. No. 337-TA-55, USITC Pub. 991 at 9 (1979) (although the testimony of an employee of the party asserting secondary meaning is usually given little weight, it is entitled to some weight) (citing Hot Shoppes, Inc. v. Hot Shoppe, Inc., 203 F. Supp. 777 (M.D.N.C. 1962).

and are entitled to little weight. Moreover, the ALJ properly considered the Katz statements in conjunction with other evidence and concluded that the alleged common law trademarks are of a weak nature based upon the divergent testimony of complainant's witnesses as to what the alleged common law trademarks are. 32/

Finally, the Katz FFs clearly do no more than record that Mr. Katz made the statements set forth, not that the ALJ accepted them as establishing the truth of the matters asserted. For example, the opinion portion of the ID states: "Katz also testified that what was recognized instantly as being different in the attache (CPX-2), was the soft set-in panel, the picture frame binding and the outside valance in addition to the handle, and the covered locks. (FF 42). . . ." 33/ Thus, we adopt the Katz FFs to the extent that they are not inconsistent with the ALJ's opinion.

We next turn to FF 170 which is based on the witness statement of Robert Davis, former Vice President of Design and Product Development of Hartmann. 34/ FF 170 states that "[t]he overall appearance of the Hartmann attache case has remained unchanged for at least the 17 years of Robert Davis'

32/ ID at 4-14, 67.

33/ ID at 7 (emphasis added).

34/ Robert Davis was employed by Hartmann from 1968-85. FF 168. He was involved in redesigning the Hartmann attache. CX-79 at 3. Davis also was involved in designing the Hartmann hanger bag and he designed Hartmann's carry-on bag and soft pullman bag. CX-79 at 6-12. After leaving Hartmann he became a consultant in the luggage field. FF 168. In January 1986, he set up his own business called Arbone Luggage. Arbone currently manufacturers a complete line of luggage.

employment with Hartmann. The appearance of the Hartmann attache case as Davis has known it since the date of his employment is the same as CPX-2." 35/ This same FF also states, however: "Although Davis was for many years involved in redesigning and designing different items of luggage for Hartmann, during Davis' employment, the only changes which Davis had made to the Hartmann attache was to add a center lock, modify the interior and improve the construction of the case. These were said to be improvements to the quality of the product but were said not to change the appearance." 36/ The qualifying word "said" indicates to us that the ALJ, in fact, believed that the overall appearance of Hartmann's attache did change. This is born out by the ALJ's conclusion that the overall appearances of the bags in issue have varied through the years. 37/

Moreover, FF 171, which is not cited by complainant, states in pertinent part: "The overall appearance of an attache case, which [Robert] Davis testified is instantly recognized as Hartmann, is a combination of all of the features of the case but not limited to any particular feature. . . ." 38/ Here again, the ALJ has used qualifying language which indicates that he merely considered this particular evidence as part of the evidentiary record but did not believe that the overall appearance of Hartmann's attache is instantly recognized as Hartmann. Robert Davis also appeared during

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35/ ID at 147-48.

36/ ID at 148 (citing R. Davis CX-79 at 3) (emphasis added).

37/ ID at 55-57.

38/ ID at 148 (emphasis added).

the hearing for cross-examination. Thus, in deciding the weight to be accorded the testimony of Robert Davis, the ALJ took into account his observation of this witness. [39] We find that Robert Davis' testimony regarding the appearance of the Hartmann attache is self-serving and is entitled to little weight.

Rather than failing to consider all his FFs, it is clear that the ALJ considered all of his FFs and then made his conclusions in accordance with the preponderance of the evidence. Only with respect to FF 311 do we disagree with the weight accorded the evidence by the ALJ.

FF 311 is based on the testimony of Michael Davis, respondent Starco's luggage expert. In deciding the weight to be accorded the testimony of Michael Davis we are mindful of the fact that the ALJ took into account his observation of this witness. [40]

Finding of Fact 311 of the ID states:

> M. Davis testified that consumers in general would recognize a Hartmann because it has been around for 15-20 years, it has been heavily advertised and it is fairly or mostly unique in attaches. The handle would be very identifiable on an attache and the second main identification would probably be the bumper edge binding and the soft-sided look. Also the flaps would be identifiable. (M. Davis Tr. 1296, 1297). [41]

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[39] ID at 2.

[40] ID at 2.

[41] ID at 191. We note that complainant incorrectly states that the ALJ "expressly recognized and accepted Mr. Davis' conclusion in his Finding of Fact 311." The ALJ merely stated that Mr. Davis "testified" as summarized in FF 311.

Complainant cites Truck Equipment Serv. Co. v. Fruehauf Corp., 536 F.2d 1210 (8th Cir.), cert. denied, 429 U.S. 861 (1976), for the proposition that secondary meaning was found where the testimony of witnesses from both parties was that consumers associated the exterior design of the product at issue with a single source and defendant had copied plaintiff's product. 42/ In Fruehauf, however, the testimony of industry witnesses was "unequivocal" that consumers associated the exterior design of a trailer with a single source. 43/ In contrast, the testimony underlying FF 311 provides:

> Questioning by the IA:
>
> Q And Mr. Lerner asked you about a Hartmann. Were you taking about a Hartmann attache?
>
> A Yes, he specifically said attache at that time.
>
> Q And you said you thought there was a good chance that consumers in general would identify it as a Hartmann?
>
> A Yes, I said that. 44/

The testimony of Michael Davis, that there was a "good chance" that consumers in general would identify Hartmann, is equivocal. Due to the factual dissimilarity between the cases, we do not find Fruehauf to be controlling. 45/

42/ Complainant's Review Brief at 13.

43/ Fruehauf, 536 F.2d at 1220.

44/ Tr. at 1296 (emphasis added). See also testimony of Michael Davis, Tr. at 1254 ("Would they recognize a Hartmann attache, consumers in general? I would say there would be a good chance of that.") (emphasis added).

45/ See also Vacuum Bottles, 337-TA-108 at 9 (Commission found a lack of secondary meaning in the configuration of complainant's vacuum bottle despite testimony of experts that consumers would identify the shape of the bottle rather than the brand).

The IA contends that opinion testimony of those in the industry is of little relevance to the question of secondary meaning, which involves what the alleged trademark means to a substantial number of consumers in the relevant buyer class. [46/] We find that although the testimony of Michael Davis on the issue of consumer recognition should not be discounted as biased, the testimony does not necessarily reflect the views of the consumer class.

In our opinion, the testimony of Michael Davis should be given some weight. According this testimony some weight, we find that complainant's alleged common law trademark in the overall appearance of its attache cases is stronger than its other alleged marks. Nonetheless, we concur with the ALJ that the alleged mark is a weak mark based upon the preponderance of the evidence and, therefore, strong evidence of secondary meaning is required.

(2) Direct evidence of secondary meaning--Complainant's survey

Courts have held that the strongest and most relevant evidence regarding whether a mark has acquired secondary meaning and, therefore, is entitled to trademark protection, is evidence by a public opinion survey or poll. [47/] In this investigation a survey was conducted for complainant by Dr. Michael Rappeport (the Rappeport survey).

[46/] See Staff's Reply Brief at 4. See McCarthy, § 15:13 at 688-89 (the conclusory testimony of dealers and wholesalers as to consumer recognition is often of little value since it may be biased and does not necessarily reflect the views of the consumer class); Callman, Unfair Competition, Trademarks & Monopolies, § 19.27 at 91-92) ("Whether or not a mark has acquired secondary meaning is a question of fact for the court, and not a proper subject for expert testimony.").

[47/] ID at 30. See Levi Strauss & Co. v. Blue Bell, Inc., 216 U.S.P.Q. 606, 612 (N.D. Cal. 1982); Deere & Co. v. Farmhand, Inc., 217 U.S.P.Q. 252, 263 (S.D. Iowa 1982).

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The ALJ found the survey critical to the issue of secondary meaning.[48] He used the eight guidelines for assessing the admissibility of surveys established by the Judicial Conference of the United States:

1. examination of the proper universe;
2. a representative sample drawn from that universe;
3. a correct mode of questioning interviewees;
4. a recognized expert conducting the survey;
5. accurate reporting of the data gathered;
6. sample design, questionnaire, and interviewing in accordance with generally accepted standards of objective procedure and statistics in the field of surveys;
7. sample design and interviews conducted independently of the attorneys; and
8. interviewers trained in the field, having no knowledge of the litigation or the purpose for which the survey is to be used.[49]

The ALJ found that the third (correct mode of questioning) and sixth (generally accepted standards of objective procedure) guidelines of the Judicial Conference were not met.[50] Moreover, in view of the errors in transcribing the information and miscoding, the ALJ stated that it is questionable whether the fifth guideline (accurate reporting of data) was

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[48] ID at 37. See Vacuum Bottles, Inv. No. 337-TA-108, USITC Pub. 1305 at 14 (1982) (although a consumer survey generally is not required to establish a common law trademark, a consumer survey was required in this case to prove that overall appearance of complainant's naked vacuum bottle had achieved secondary meaning separate and distinct from the mark "UNO-VAC" because the few ads and sales of bottles with complainant's mark on them did not establish secondary meaning).

[49] ID at 28-29. See Certain Compound Action Metal Cutting Snips and Components Thereof, Inv. No. 337-TA-197, USITC Pub. 1831 (1986), ID at 80.

[50] ID at 53.

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met. [51] In light of these deficiencies, the ALJ gave complainant's survey no weight. [52]

The survey was divided into the following stages for conducting the secondary meaning portion of the survey:

Stage 1:
The interviewee was shown a Hartmann bag and asked "Can you tell me the manufacturer or brand name of this piece of luggage?" (Question 2) [53]

Stage 2:
If the interviewee answered yes, the interviewee was asked "Which manufacturer or brand name is that?" (Question 3) and "Why do you say that?" (Question 3A) The later question was referred to as a "probe" question.

Stage 3:
If the interviewee answered "No" to Question 2, the interviewee was asked: "Do you believe that [hanger bags or carry-on bags or attache cases] which look like this are manufactured by one company or more than one company?" (Question 4) If the interviewee answered "One Company" the interviewee was then told that the interviewee had just been shown a piece of Hartmann luggage, and the interviewer proceeded to Question 5 (confusion portion of the survey).

Stage 4:
If the interviewee answered Question 4, "More than one company," the interviewee was asked Question 4A: "Do you believe that [hanger bags or carry-on bags or attache cases] which look like this originally were manufactured by one company and then were copied by other companies or that [bags] which looks like this were never identified with one company?" The interviewee was then told that he or she has just been shown a Hartmann bag

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[51] ID at 43-44 n.26. See ID at 36 n.18.

[52] The ALJ found that although there was an attempt to cover identifying names and symbols, in one or two cases the covering material came off. ID at 32; FF 374, 405. In addition, an "h" for Hartmann was left showing on the zipper of the hanger bag and at least one interviewee was influenced by this. ID at 49. Moreover, one of the interviewees responded that the carry-on bag was a Hartmann because the "zipper has their insignia (on front)." Dr. Kegan testified that showing the insignia in the survey created serious doubts about the survey's reliability. ID at 46, 47; FF 532.

[53] Question 1 was "Have you shopped for or purchased luggage in the past year?" For those individuals who answered in the negative, the interview was terminated.

and the interviewer proceeded to Question 5 (confusion portion of the survey). According to Rappeport, survey Questions 2, 3 and 3A involved "Recognition of the Hartmann Look by name;" and Questions 4 and 4A as well as Questions 2, 3, and 3A involved "The Hartmann Look as Originating from a Single Source." 54/

The ALJ examined the reasons which the 33 interviewees who were shown a Hartmann attache case and identified the attache as a Hartmann gave for saying "Hartmann." 55/ He found that only two, at the most, of these interviewees identified possibly two of what complainant alleged are the three dominant elements of the trademark. 56/

The ALJ stated that a trademark survey is supposed to associate the trademark with the product. 57/ He added that the record in this investigation does not establish how a mere recognition, without knowing if the alleged recognition is because of the trademark, is indicative of secondary meaning for the trademark. 58/ The ALJ stated that, if Rappeport is correct, it is unnecessary in any trademark survey to establish whether an interviewee associates the common law trademark with a single source. Rather,

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54/ ID at 34; FF 394.

55/ ID at 37-39.

56/ ID at 40.

57/ A trademark survey is supposed to associate the trademark with the source of the product, not the product itself. See infra note 18 and accompanying text; Cube Puzzles, USITC Pub. 1334 at 10 (citing Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 214 U.S.P.Q. 1, 4 n.11 (1982)). In light of other statements made by the ALJ in the opinion portion of his ID, it is clear to us that the ALJ was aware of the law's requirement.

58/ ID at 42. Dr. Kegan, Starco's expert on market surveys, testified that the Rappeport survey made no distinction between protectable trade dress and nonprotectable elements, including functionality. FF 519, 534.

it is only necessary to associate a feature of the product with a single source, regardless of whether the feature identifies or is part of the common law trademark. 59/ Accordingly, he found that without further probing questions, the responses have little relevancy in establishing that the common law trademark defined by complainant has acquired secondary meaning. 60/

The ALJ further found that no probing question was asked the interviewees who responded to either question 4 or question 4A. As such, the ALJ found "nothing in the record to show why the interviewees either believed that the Hartmann bag shown him was made by one company or believed that the Hartmann bag was manufactured by more than one company, or believed that the Hartmann bag was originally manufactured by one company and later was copied by other companies." 61/ He stated that the absence of probing questions following questions 4 and 4A seriously affects the reliability of the survey, particularly when the reasons stated by the interviewees in answer to question 3 are examined. 62/

59/ ID at 42.

60/ ID at 44.

61/ ID at 50.

62/ Rappeport testified that, by the probing question 3A, he was trying to sort out those people who were merely guessing. FF 439. The record, however, does not establish why an interviewee cannot guess an answer to question 4. ID at 50. Dr. Kegan, Starco's expert on market surveys, testified that a probing question should be asked after every important question in a survey of the type conducted under Rappeport. ID at 51; FF 524. In addition to the absence of probing questions after questions 4 and 4A, an explicit option to respond "I don't know" was not included for questions 4 and 4A of the survey. ID at 53. Dr. Kegan testified that in the absence of an explicit "Don't know" option, interviewees are more likely to guess. ID at 53; FF 524.

We agree with the ALJ that the survey should be accorded no weight in establishing secondary meaning. One fundamental problem with the survey is that it consists of questions that tend to slant replies toward a suggested response.

We note that although questions similar to Question 2 have been asked in previous surveys accepted by the Commission, the results in prior Commission cases yielded much higher levels of single source association. 63/

We also note that a properly conducted survey could have utilized the approach taken in Question 4 provided that the question was not preceded by Question 2. In our opinion, Question 2 implies that there is a single manufacturer and is, therefore, leading when it precedes Question 4.

Regarding the approach taken in Question 4, we note that although the law permits a single source to be anonymous, it has not done away entirely with the requirement that "there be a single ultimate source of control over a product." Palladino, Techniques for Ascertaining If There Is Secondary Meaning, 73 T.M.R. 391, 399 (Palladino). According to Palladino, a satisfactory approach to the problem of the modern market place may be to determine whether or not interviewees associate plaintiff's claimed trademark (or trade dress) with a product sponsored by plaintiff by asking them:

63/ See, e.g., Cube Puzzles, USITC Pub. 1334 at 13 (40% of interviewees in first survey and 72% in second survey identified complainant as the single source); Textron, 753 F.2d at 1023 (61% level of single source association with complainant); Certain Heavy-Duty Staple Gun Tackers, Inv. No. 337-TA-137 at 34 (1984) (Unreviewed Initial Determination) (79% identification of the complainant as the single source); and Certain Sneakers with Fabric Uppers and Rubber Soles, Inv. No. 337-TA-118, USITC Pub. 1366 at 8 (1983) (67% identification of the product configuration with the complainant). In the Rappeport survey, complainant obtains only a 7% level of single source identification with Hartmann.

Show product with claimed trademark

4B. Do you believe this [product with claimed trademark] is sponsored by one, or more than one, company?

4C. If sponsored by one company, why do you say that.

Palladino states that Question 4C is needed to "isolate" the mark, "a necessary step in establishing whether or not [interviewees] associate the mark with a product sponsored by one company." 64/ A question such as Question 4C, which the ALJ referred to as a "probe" question, was lacking from complainant's survey.]

(2) Circumstantial evidence of secondary meaning

(i) Sales, advertising, and long use

Complainant argues that Hartmann has enjoyed a long period of considerable sales of its products using the alleged common law trademarks and that it has submitted convincing circumstantial evidence of secondary meaning in the form of extensive national advertising. 65/

The ALJ stated that in considering evidence of this nature, the question is not the extent of promotional efforts. Rathor, there must be evidence that the advertising was effective in creating consumer perception of the overall appearances as trademarks. 66/ Complainant must also show the acquisition of secondary meaning by the alleged trademarks separate and independent from

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64/ Palladino, 73 T.M.R. at 399.

65/ ID at 53-54. The attache case with the alleged trademark was introduced by Hartmann in 1963. The hanger bag and carry-on bag were introduced in the early 1970s. The soft pullman was introduced in late 1983.

66/ ID at 54.

secondary meaning attributable to any word marks or functional attributes that appear in the promotion efforts. [67] The ALJ noted the "functional aspect" (i.e., less wasted space in square corners) of complainant's advertising and the fact that complainant's advertising is replete with the Hartmann logo, the Hartmann trademarked slogan "We don't cut corners", and the Hartmann name. [68]

The ALJ also found that complainant admitted the existence of three different common law trademarks in the products in issue. In addition, while there has been a "sameness in certain elements of the overall appearance of the particular bags in issue, the overall appearances through the years, even in particular bags in issue, have varied." [69] Finally, the ALJ found that the colors and materials of the particular Hartmann bags in issue vary.

As stated earlier, Ira Katz, former president of Hartmann, stated that the distinctive features of the Hartmann attache case in issue were recognized by customers. Additionally, Ms. Penix, vice-president of Hartmann, testified that judging from correspondence and telephone conversations with customers as part of her customer service responsibility, customers recognized the Hartmann look and overall appearance of its particular products. Nonetheless, the ALJ stated that "Mr. Katz and Ms. Penix are obviously interested parties and hence their testimony is not controlling." [70] We find that the Katz statements and the Penix testimony as to the above respective matters is self-serving and should be accorded little weight. We also find that Robert Davis' testimony is some evidence of secondary meaning. For the reasons stated earlier, however, we have accorded this testimony little weight.

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[67] ID at 54. See In re Mogen David Wine Corp., 372 F.2d 539; 152 U.S.P.Q. 539, 595 (C.C.P.A. 1967); Petersen Mfg. Co. v. Central Purchasing, Inc., 740 F.2d 1541, 222 U.S.P.Q. 562, 569 (Fed. Cir. 1984); Vacuum Bottles, USITC Pub. 1305 at 10-14; Vertical Milling Machines, USITC Pub. 1512 at 20.

[68] ID at 55 (citing ID at 23-26).

[69] ID at 55-56. For example, the Hartmann attache CPX-4 has no visible combination lock and even no visible lock (locks hidden beneath lock straps). ID at 56. In contrast, the Hartmann attaches CPX-2, CPX-3, and CPX-5 have visible combination locks under the saddle handle. Moreover, Hartmann attaches CPX-2, CPX-3, and CPX-4 have patches on the side with the Hartmann name whereas Hartmann attache CPX-5 has the name on the side but does not have it on a patch. ID at 56-57. The Hartmann attache CPX-5 has an embossed "h" on a patch on the top panel. In contrast, the Hartmann attaches CPX-2, CPX-3, and CPX-4 have an embossed "h" directly on the top panel (no patch). ID at 57.

In its brief on review, complainant asserts that its success in creating secondary meaning for its designs was most graphically established by FF 311. [71] As stated earlier, we have accorded the testimony of Michael Davis some weight.

(ii) Agreements of settled respondents

Complainant also argued that secondary meaning was shown by the fact that certain respondents had entered into consent orders or settlement agreements. [72] The ALJ correctly concluded that third party agreements have "little or no probative value" as to secondary meaning. At best such agreements indicate that complainant's competitors found it more advantageous to enter into an agreement than to run the risk and expense of litigation. [73]

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[70] ID at 57 (citing In re David Crystal, Inc., 132 U.S.P.Q. 1, 2 (C.C.P.A. 1961)); Plastilite Corp. v. Kassnar Imports, 508 F.2d 824, 184 U.S.P.Q. 348, 350 (C.C.P.A. 1975).

He further found that in the testimony of Ms. Penix relied upon by complainant no details were presented with respect to the correspondence and telephone conversations. ID at 57; Tr. at 90-91.

[71] Complainant's Review Brief at 2-3.

[72] Complainant's Post Hearing Brief at 32-33.

(iii) Customer returns

Complainant also argued that three instances of customer returns showed secondary meaning. [74] With respect to the first instance, the ALJ found that when the individual received the bag as a gift, it had a Hartmann tag on it which led the recipient to believe the bag was a Hartmann. [75] With regard to the second instance of a customer return, the ALJ found that the record was unclear as to why the bag was returned as a Hartmann. [76] The third instance involved an employee in the luggage department of American Airlines who apparently believed that a copy of a Hartmann International Series pullman suitcase was a Hartmann and returned it for repair. The ALJ found the record to be unclear regarding why the employee believed the product was a Hartmann. [77]

The IA stated that the reason for the return of this third bag can reasonably be inferred from the record. [78] He also asserts, however, that even this instance did not involve the confusion of a customer. [79] We find the IA's analysis to be persuasive. We, therefore, conclude that the evidence of the third instance should be accorded little weight.

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[73] See ID at 58. See In re The Wella Corporation, 565 F.2d 143, 144 n.2, 196 U.S.P.Q. 7, 8 (C.C.P.A. 1977).

[74] Complainant's Post Hearing Brief at 33-34.

[75] ID at 58.

[76] ID at 59.

[77] ID at 59-60; CX-99.

[78] See CX-99 and CX-100.

(iv) Intentional copying by respondents

Complainant also asserted that the substantial similarity in the appearance of respondents' products vis-a-vis complainant's products when other designs could have been used is "probably" sufficient evidence that the respondents engaged in studied and deliberate copying. [80] Complainant argued that in Certain Novelty Glasses, Inv. No. 337-TA-55, USITC Pub. 991 (1979) ("Novelty Glasses") and Certain Miniature Plug-In Blade Fuses, Inv. No. 337-TA-114, USITC Pub. 1337 (1983) ("Fuses") the Commission held that deliberate copying raised a rebuttable presumption of secondary meaning and that no respondent had rebutted the presumption. [81]

In Vacuum Bottles, the Commission stated that in Novelty Glasses it found that a presumption of secondary meaning is raised only by a deliberate and close imitation of the senior user's distinctive trademark and that the glasses in issue in Novelty Glasses could have been considered almost inherently distinctive or semi-fanciful. [82] Moreover, in the cases cited by the complainant in Vacuum Bottles for the proposition that deliberate copying shows secondary meaning, the marks involved were strong marks for which little evidence of secondary meaning had to be shown. The Commission in Vacuum Bottles concluded that copying should be considered as evidence of secondary meaning, rather than a presumption thereof. [83/]

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[79] Response of the Commission Investigative Staff to Complainant's Petition for Review of Initial Determination at 12-13.

[80] ID at 60; Complainant's Post Hearing Brief at 26.

[81] Complainant's Post Hearing Brief at 28, 29.

[82] Vacuum Bottles, USITC Pub. 1305 at 15-16.

In this case, the ALJ found that a functional aspect (the lock strap) of the alleged common law trademark for the Hartmann attache case is claimed in an expired utility patent. [84/] He found that Starco's representatives believed that there were no patent problems with the Starco attache because any patents on the attache had expired and the construction of the Starco attache was different. In addition, complainant's president Katz stated that the utility patent showed an attache that has the Hartmann look. [85/] The ALJ further found that certain aspects of the alleged common law trademarks are shown in two expired design patents (the lock strap and the figure-8 handle). [86/] Moreover, the copying included the copying of functional features.

[83/] (Vacuum Bottles), USITC Pub. 1305 at 17. In Fuses, the Commission stated that an unlawful copying occurs where one party copies the non-functional features of a product of another. The record in Fuses also contained evidence that respondents passed off their imported fuses as complainant's fuses by using complainant's letter trademarks and a picture of complainant's product in advertisements.

[84/] ID at 62.

[85/] ID at 62; FF 126.

[86/] ID at 62; FF 298, 299.

The ALJ also found nothing in the record to establish that there have been instances where respondents have used Hartmann's logo in their advertisements. To the contrary, he found that respondents' advertisements have referenced their own trade symbols. [87] He concluded that the record in this investigation does not establish an intent to deceive, a necessary element to establishing passing off. [88]

The ALJ stated that although it is reasonable to assume that there has been copying of at least some features of complainant's alleged common law trademarks, a finding of copying alone is not sufficient evidence from which to conclude that secondary meaning has been acquired. [89] For the foregoing reasons, the ALJ found that complainant "has not established a factual foundation, through a preponderance of the evidence, from which an inference may be drawn that each of the alleged common law trademarks has acquired secondary meaning." [90]

In its review brief, complainant asserts that deliberate copying amounts to clear admissions by conduct which are comparable to the testimony on the same subject by respondent Starco's expert, Michael Davis. Complainant argues that Starco

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[87] ID at 63; FF 366.

[88] ID at 63 and n.32.

[89] ID at 63.

[90] *Id*.

91/ It also

asserts that

92/

Complainant contends that all of the Commission's precedents have recognized that deliberate copying is to be given great weight in determining secondary meaning. 93/

Complainant argues that the ALJ erroneously minimized the impact of the copying evidence as to Starco based on "no patent problems" and the copying of "so-called 'functional features.'" 94/ It contends that the ALJ himself found that the overall appearances of the complainant's products were nonfunctional and Starco copied the overall appearance. 95/

Respondent Starco asserts that in complainant's review brief

96/

91/ Complainant's Review Brief at 6, 17.

92/ Id. at 17.

93/ Id. at 17-18 (discussing Novelty Glasses, Fuses, and Certain Single Handle Faucets, Inv. No. 337-TA-167, USITC Pub. 1606 (1984) (Faucets).

94/ Id. at 19.

95/ Id. at 20.

96/ Reply Submission of Star Leather Products Co. in Response to Commission Notice of February 13, 1987 at 3.

It further asserts that the cases that were made by Starco for K Mart were clearly identified as a product of Starco, "thereby showing an intent to distinguish them clearly from the luggage made by Hartmann." 97/

The ALJ's finding regarding copying was in accordance with Commission precedent. The Commission has limited a presumption of secondary meaning to cases where there is a very close copying of a strong mark combined with evidence of passing off or other deceptive practices. 98/ In Faucets, 99/ the Commission concluded that intentional copying may create a rebuttable presumption of secondary meaning. Nonetheless, Faucets does not change the Commission's typical treatment of intentional copying as evidence, rather than as a presumption, of secondary meaning.

This conclusion is consistent with the mainstream of trademark law. 100/ A presumption of secondary meaning based on a finding of intentional copying has been criticized by McCarthy. McCarthy states: "Proof of egregious conduct should not be thought of as an exception for the need for

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97/ Id. at 10. See Vacuum Bottles, USITC Pub. 1305 at 19 (although one respondent's bottle had same shaped cup and similar packaging as complainant's bottle, neither this bottle nor respondents' other bottles had complainant's distinctive "UNO-VAC" on the side of the bottle).

98/ See Vacuum Bottles and Blade Fuses.

99/ USITC Pub. 1606, Unreviewed ID at 46,

100/ McCarthy, § 15:5 at 677.

secondary meaning, but rather as a piece of evidence to prove that consumer recognition and secondary meaning in fact exists." 101/

Moreover, product configuration marks are not usually strong marks. In this case, the ALJ found the alleged marks to be weak and, therefore, strong evidence of secondary meaning was required.

The ALJ did accord some weight to complainant's circumstantial evidence of copying. As discussed above, we think that some weight should also be given to the testimony of Michael Davis (FF 311) which relates to attache cases.

We determine that complainant has not established by a preponderance of the evidence that the alleged common law trademarks in the overall appearances of its luggage products have attained secondary meaning.

101/ *Id*.

VIEWS OF CHAIRMAN LIEBELER

I would affirm and adopt the initial determination (ID) of the administrative law judge (ALJ) in Certain Luggage Products, Inv. No. 337-TA-243. Including myself, three Commissioners have expressed the view that the ID was sufficiently clear that review was unnecessary. See Additional Views of Vice Chairman Brunsdale and Commissioner Rohr, infra. Thus, I see no need to rewrite the ALJ's opinion.

ADDITIONAL VIEWS OF VICE CHAIRMAN BRUNSDALE AND COMMISSIONER ROHR

We concur with the Commission majority in its decision in this review of the administrative law judge's (ALJ's) initial determination (ID). We further concur in general with the reasons stated in the majority views for our affirmation of the ALJ's decision. We note only that we do not believe review to have been necessary. The essential purpose of this review has been, in our view, to clarify certain ambiguities in the ID relating principally to the weight which the ALJ accorded to the testimony of the witnesses who appeared before him. Certainly, more explicit findings would be useful to the Commission and in any review of the Commission decision. In this particular investigation, however, the factual context of the decision was sufficiently clear that we do not believe review to have been necessary. Therefore, had not the Commission determined to review the ID, we would have affirmed the ID as written.

CERTAIN LUGGAGE PRODUCTS Inv. No. 337-TA-243

Certificate of Service

I, Kenneth R. Mason, hereby certify that the attached(PUBLIC VERSION) of the Notice of Commission Decision to affirm Administrative Law Judge's Initial Determination finding no violation of section 337 of the Tariff Act of 1930, was served upon Jeffrey L. Gertler, Esq., and Ethel L. Morgan, Esq., and upon the following parties via first class mail, and air mail where necessary, on March 31, 1987.

Kenneth R Mason

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PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of)
)
CERTAIN LUGGAGE PRODUCTS)
) Investigation No. 337-TA-243

INITIAL DETERMINATION

Paul J. Luckern, Administrative Law Judge

Pursuant to the notice of investigation (51 Fed. Reg. 10580-81 March 27, 1986), this is the administrative law judge's initial determination under Rule 210.53 of the Rules of Practice and Procedure of this Commission, 19 C.F.R. § 210.53. The administrative law judge hereby determines, after a review of the submissions of the parties and of the record developed at the hearing, that there is no violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C § 1337), hereinafter section 337, in the importation into the United States, and in the sale, of certain luggage products with the effect and tendency to destroy or substantially injure an industry efficiently and economically operated in the United States.

[illegible] 15 P12:54

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ABBREVIATIONS

CPFF	Complainant's Proposed Findings of Fact
CPost	Complainant's Post Hearing Brief
CPX	Complainant's Physical Exhibit
CX	Complainant's Exhibit
RPost	Respondent Starco's Post Hearing Brief
RPX	Respondent Starco's Physical Exhibit
RX	Respondent Starco's Exhibit
SPost	Staff's Post Hearing Brief
SPostR	Staff's Post Hearing Rebuttal Brief
SPX	Staff's Physical Exhibit
SRPX(SPRX)	Staff's Rebuttal Physical Exhibit
SX	Staff's Exhibit
Tr.	Hearing Transcipt

PROCEDURAL HISTORY

On February 12, 1986, Lenox, Incorporated (complainant), on behalf of its division Hartmann Luggage Company (Hartmann), filed a complaint with the Commission under section 337 relative to the importation of certain luggage products. On March 14, 1986, the Commission instituted an investigation to determine whether there is a violation of subsection (a) of section 337 in the alleged unlawful importation of certain luggage products into the United States, or in their sale, the effect or tendency of which is to destroy or to injure substantially an industry, efficiently and economically operated, in the United States. The notice of investigation was published on March 27, 1986. (51 Fed. Reg. 10580-81).

The notice of investigation named the following twelve respondents:

1. Pei Lin Leather Products (Pei Lin), Taipei, Taiwan
2. Weltyle Plastic Products Co., Ltd. (Weltyle), Taipei, Taiwan
3. Star Leather Products, Ltd. (Starco), Taipei, Taiwan
4. Pungkook Industrial Co., Ltd. (Pungkook), Seoul, Korea
5. Kingport International Corporation (Kingport), Evanston, Illinois
6. Pedro Companies, Inc. (Pedro), St. Paul, Minnesota
7. American Guard-It Manufacturing Company (American Guard-It), Chicago, Illinois
8. Montgomery Ward & Co., Inc. (Montgomery Ward), Chicago, Illinois
9. Monarch Luggage Company, Inc. (Monarch), Brooklyn, New York
10. Dimensions Unlimited, Inc. (Dimensions), Mt. Prospect, Illinois 60057

11. K mart Corporation (K mart), Troy, Michigan

12. Winn International Corporation (Winn), Chicago, Illinois

The investigation has been terminated with respect to eight of the named respondents on the basis of settlement or consent order agreements.[1/]

The four nonsettling respondents remaining in the investigation are Pei Lin, Starco, American Guard-It and K mart.

A prehearing conference was held on September 29, 1986. The hearing commenced on September 29 following the prehearing conference and concluded on October 3. Closing arguments were heard on October 30.

Post hearing submissions were submitted by complainant, respondent Starco and the Commission investigative attorney, the only parties who appeared at the hearing. The matter is now ready for decision.

This initial determination is based on the entire record including the evidentiary record compiled at the hearing, and the exhibits admitted into evidence. The administrative law judge has also taken into account his observation of the witnesses who appeared before him during the hearing. Proposed findings submitted by the parties participating at the hearing, not herein adopted, either in the form submitted or in substance, are rejected

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[1/] The Commission determined not to review the initial determinations terminating the investigation as to the following respondents on the basis of settlement agreements: Pedro on July 15, 1986, Winn on November 25, 1986 and Pungkook on December 15, 1986. The Commission determined not to review the initial determinations terminating the investigation as to the following respondents on the basis of consent order agreements: Kingport and Monarch on November 18, 1986, and Weltyle, Montgomery Ward and Dimensions on November 25, 1986.

either as not supported by the evidence or as involving immaterial matters. The findings of fact include references to supporting evidentiary items in the record. Such references are intended to serve as guides to the testimony and exhibits supporting the findings of fact. They do not necessarily represent complete summaries of the evidence supporting each finding.

JURISDICTION

The Commission has in rem and subject matter jurisdiction in this investigation. (FF 1). It also has in personam jurisdiction. (FF 2).

OPINION

The notice of investigation defined the scope of the investigation, with respect to any unfair act, as: (1) common law trademark infringement, (2) trade dress misappropriation, (3) passing off, (4) false representation, (5) trademark dilution, and (6) unfair competition.[2/]

Complainant put in issue four types of luggage products--attaches, hanger bags, carry-on bags, and soft pullman suitcases. Specifically these four

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[2/] During the closing arguments on October 30, 1986, complainant's counsel represented that if there is a finding of no infringement of the common law trademarks, it automatically follows that there is no infringement of any trade dress, no unfair competition, no passing off, no false representation and no trademark dilution. (Tr. at 1524, 1525).

types include: (1) those manufactured and sold by complainant as model A4 and A9 attache cases, model H1 and H3 hanger bags, model C2 and C3 carry-on bags, and soft pullman suitcases, and (2) alleged copies of certain of the same four types of luggage manufactured, imported and/or sold by ten of the twelve respondents. (FF 5).[3/]

Complainant argued that the rights asserted stem from Hartmann's creation of three different common law trademarks in the overall appearances of the four luggage products. (CPost at 1). According to complainant three, not four, different common law trademarks are involved in the investigation because the soft pullman suitcases have substantially the same "overall appearance" as Hartmann's attaches. (CPost at 1, 2).

I. The Alleged Common Law Trademarks In Issue

(a) Attache

According to complainant (CPFF 7):

> The common law trademark or trade dress of the Hartmann attache cases involved in this investigation consists of the overall appearance of the products and includes the dominant elements[4/] of (a) the figure-8 saddle handle with a raised ridge in the center of the handle, (b) the lock straps emanating from the handle and going around and being secured

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[3/] The administrative law judge has found that the evidence shows that each of respondents Winn and Weltyle has not imported and/or sold alleged copies. (FF 632, 633).

[4/] Complainant has not defined "dominant." Webster's Seventh New Collegiate Dictionary defines "dominant" as "commanding, controlling, or prevailing over all others."

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> at the sides and (c) the square shape of the product. . . . That trade dress has been used for the Hartmann A4 attache case (CPX-2, CPX-4, CPX-5), the Hartmann A9 attache case (CPX-3),[5] the Hartmann EC7 and EC8 attache cases (CPX-11),[6] and the Hartmann framed International series suitcases (CPX-1). . . .

While complainant's counsel in CPFF 7 has attempted to define the alleged common law trademarks, the administrative law judge finds that testimony from complainant's witnesses and Hartmann's promotional material establish an uncertainty as to the nature and scope of each of complainant's three alleged trademarks.[7] Thus complainant's Ms. Penix when asked by complainant's counsel what she considered are the dominant portions of the "Hartmann look" in Hartmann attache CPX-2 in issue testified that the dominant features included "obviously the Hartmann name". (FF 53). Ms. Penix also testified that the dominant features of the CPX-3 attache, which was said to be a little wider than the the CPX-2 Hartmann attache, included the stitching, and the rivets. (FF 53).

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[5] Hartmann CPX-2 attache, identified by complainant as an attache in belting leather, was introduced to the market by Hartmann in the early sixties. (FF 37, 40). Hartmann CPX-4 has been identified by complainant as an attache case in vinyl. Hartmann CPX-5, identified by Hartmann as an attache case in walnut tweed, was introduced to the market by Hartmann in 1965. CPX-3 has been identified by Hartmann as an attache case in belting leather. (FF 40).

[6] Complainant has not accused any of the respondents of importing and/or selling an attache represented by either the EC-7 or EC-8 (FF 122) or of importing and/or selling the Hartmann framed International series suitcases represented by CPX-1.

[7] In closing arguments, the staff agreed with complainant that it has the right to use its alleged marks, whatever the marks are but argued that it has had a difficult time addressing that issue because the staff, even at closing arguments, was uncertain what complainant's configuration marks are in this investigation. The staff considered its uncertainty a strong indication that the marks in issue are not inherently distinctive and are not strong marks. (Tr. at 1472, 1476).

At another time Ms. Penix, who is currently Senior Vice President of Operations at Hartmann and joined Hartmann in 1968 as administrative assistant to Hartmann's president (FF 36), testified that she would not attempt to dissect the "Hartmann look;" that in her opinion it is the total look of the Hartmann attache; that she does not think that it is a lock strap, a shoulder strap or whatever; that it is the total look, the sum total of everything that goes into the attache. (FF 49).

Ms. Penix also testified that part of the "Hartmann look" with respect to the products in issue relates to the quality, color and texture of the materials used in the products but in some products in issue such are more dominant than in other products in issue. (FF 103). Quality was said to be synonymous with the Hartmann name and part of the ingredients that make up the Hartmann look. (FF 104). Ms. Penix also testified that quality is an intangible part of the Hartmann look. (FF 64). She has also testified that the fabrics used, colorations and textures of the fabric all contribute to the total Hartmann look in a broad-brush sense. (FF 266, 270). She further testified that quality by itself has nothing to do with the Hartmann look. (FF 105, 271).

Ira Katz, who introduced the attache common law trademark in issue in the early sixties, included, as an element of the common law trademark, the valance that went around the middle point of the attache where the top meets the bottom and the bumper or the extrusion around the outer edge of the panel. (FF 41). The family of Ira Katz bought the Hartmann Luggage Company in 1955 and Katz became the company president in 1957. Katz sold Hartmann to complainant in 1983 but remained for two additional years to train his successor. He now does some consulting for complainant. (FF 35).

Katz also testified that what was recognized instantly as being different in the attache (CPX-2) was the soft set-in panel, the picture frame binding and the outside valance in addition to the handle, and the covered locks. (FF 42). The rivets were said by Katz to be unique in the sense that although they are hardware, the "Hartmann look is a very functional look" and the rivet is a sign of strength and hence was left exposed. The edging of material with respect to how the material was finished, i.e. a raw polished edge, was said not to be unique. (FF 44). Also a major feature in the CPX-2 attache was said by Katz to be a name plate on the side of the attache because it was felt that people would be proud of their Hartmann attache and would like to have other people know what it is so that it could be seen as the Hartmann customer walked down the street. Most name plates in the early sixties were put under the handle where only the consumer could look at the brand name. (FF 47). The outside valance was thought by Katz to be unique. (FF 47). Katz further testified that another feature that makes the Hartmann attache unique is that very little hardware is showing on the attache. (FF 48). Yet Robert Davis, who was employed by Hartmann from July 1968 to July 1985 and who in 1981 became Vice President of Design and Product Development (FF 168), testified that the hardware, the fact that it is metal, and the fact that it is substantial hardware are parts of the "instantly recognizable features" of the Hartmann attache. (FF 280).

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Robert Davis, in his witness statement, stated that the quite distinctive overall appearance of the Hartmann attache CPX-2 is a combination of all of the features of the case and is not limited to any particular feature. Those features were said to include (1) the handle, (2) the lock flaps, (3) the riveted saddle, (4) the concealed locks, (5) the valance, (6) the prominent window frame binding, (7) the drop-in panel construction, (8) the square corners, (9) the prominent name identification and (10) the hinges. (FF 280). Katz testified that the hinges are not part of the Hartmann look. (FF 43). Ms. Penix testified that the drop-in panel construction is not a dominant feature in the Hartmann attache CPX-3. (FF 161).

Robert Davis also testified that to a certain degree the stitching and the color coordination of the thread to the material should be included in the overall look. Davis further testified that the color of the Hartmann attache, certainly the walnut tweed fabric of Hartmann CPX-5, is unique to Hartmann and is instantly recognizable. Even the general tone and feel of the Hartmann leather used in the Hartmann attache was said by Davis to be unique. In addition he testified that quality is built into a Hartmann bag and that one can distinguish something that is quality or made with quality most of the time as opposed to something that has not been made with quality. (FF 171, 280). However he also testified that it is difficult to say whether the quality of the bag itself is part of what makes the Hartmann bag instantly recognizable and that there are times when it is very difficult to distinguish quality. (FF 269). Robert Davis further testified that the color of the belting leather was a part of being instantly recognizable as Hartmann. (FF 275).

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Hartmann's promotional material, for example, states that "Premium leathers, fabrics and vinyls are used to create a durable business companion that makes a lasting impression. Little wonder, then, that Hartmann attaches are recognized the world over as a mark of the successful business person" (FF 83); that its luggage is "so duarble" (FF 69a); and that "When it comes to leather luggage, you should judge every case by its cover. . . . For years Hartmann has used only industrial belting leather in its leather luggage". (FF 69a). A 1985 Hartmann product brochure in referring to," What sets a Hartmann apart," refers to "A tradition of quality," "The finest materials," "Rugged durability," "An unmatched variety," and "Designed to meet your needs." (FF 82). A Hartmann attache ad states "Classic square-corner shape and soft expanding side panels offer far more carrying space than hard-sided cases of comparable size." (FF 90).

(b) Hanger Bag

According to complainant (CPFF 14):

> The trade dress of Hartmann's hanger bags involved in this investigation consists of the overall appearance of the products (HM/HW and H3) and includes the dominant elements of (a) the flattened version of the figure-8 saddle handle with simulated lock flaps and (b) double buckles on the lower pocket flap or flaps. . . .

As with the attache the record establishes an uncertainty as to the nature and scope of complainant's alleged common law trademark for the hanger bag. Thus while it appears from complainant's CPFF-14 that the overall appearance of the products HM/HW and H3 are identical the record is to the contrary. The original hanger bags known as the HM and HW, introduced by Hartmann in 1973

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(FF 174), had the following features said to be similar to the features of the Hartmann H3 bag:

(a) a flattened version of the figure eight saddle handle formed by a double-stitched line of layers of leather in a figure eight shape with a stitched band over the middle and secured to the bag by a shortened version of the lock flap running through the loops on the handle and secured by rivets to the bag;

(b) wide prominent trim strips across the width of the center of the bag and across the width at the top of the bag formed of stitched leather;

(c) color coordination with leather or simulated leather binding, straps, welting and piping as well as with prominent zippers also color coordinated;

(d) the marine style hook for hanging the bag and other marine style hardware;

(e) the top handle design with a flattened leather look; and

(f) double buckles at the center of the lower pocket with a flap. (FF 173)

However, the original Hartmann hanger bags included the following features, which were changed in subsequent versions:

(g) a tapered gusset at the side of the bag; and

(h) a diagonal zipper on the back of the bag. (FF 175)

In about 1977/78, Robert Davis designed the H3 bag. He did this by adding a top pocket to the front of the bag and making the bottom pocket into dual pockets with dual flaps having the prior leather binding and dual buckles. Also Hartmann added to the hanger bag a rectangular leather label with the Hartmann "h" design on it. (FF 176).

Complainant has also referred to a third Hartmann hanger bag whose overall appearance is not identical to the overall appearances of either the HM/HW or H3 bags as acknowledged by complainant:

> In 1981, Hartmann also introduced a scaled down version of the H3 hanger bag in the form of its H1 hanger bag (CPX-7). The H1 hanger bag has most of the dominant features of Hartmann's H3 hanger bag in the form of the same flattened figure 8-saddle handle with the simulated lock flaps, the square shape and the dual pockets, but does not have the dual flaps with the dual buckles. . . . (Emphasis added). (CPFF 15)

There is also testimony that in 1982/83 Robert Davis made other changes to the Hartmann hanger bag, such as changing the top pocket to allow zipper access at the side or top of the pocket, modifying the closure of the bag and adding individual snaps which are hidden under the buckles on the dual bottom pockets. (FF 176).

While complainant has stated that the dominant elements of the hanger bag common law trademark are the (a) flattened version of the figure-8 saddle handle with simulated lock flaps and (b) double buckles of the lower pocket flap or flaps, Ms. Penix testified that the handle, square shape and the trimming were a portion of the Hartmann look in the HM and HW hanger bags. (FF 58). Referring to hanger bag H3 she testified that the trimming is the handle board across the middle of the bag, the leather trim across and the welting along the edges. (FF 59). She also included in the "most dominant features" of the H3 bag the square shape. (FF 287). A dominant feature of the H3 bag was also said by Ms. Penix to be the design feature of the double pockets with a quick release snap for entry into the pockets. (FF 155). Ms. Penix, when asked about the aspects of the appearance in the Hartmann look in the H1 hanger bag introduced in 1981 answered that "I would not attempt to dissect that case. It is the total appearance of that case." (FF 62).

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Ms. Penix, at another time, testified that the dominant features of the Hartmann H1 hanger bag (CPX-7) are the center strip, the flattened figure-8 handle and the loop going over to form the simulated lock flaps. She believed the lesser features that constitute the Hartmann look are the square shape, the binding, the stitching and the quality. (FF 288). Thus, according to Ms. Penix, while the square shape is a most "dominant" feature in the Hartmann H3 hanger bag overall appearance, the square shape is a lesser feature in the Hartmann H1 hanger bag.

Robert Davis testified that the overall look of Hartmann's H3 hanger bag (CPX-6), in addition to the handle and dual leather buckles and leather binding, includes the color coordination between the zippers and the trim, the marine-look hardware and the prominent trim strips. (FF 285). He also included in the dominant features of the hanger bag the rivets in the saddle. (FF 286). Mr. Katz testified that a Hartmann hanger bag is distinctive or recognizable because of the square look, the handle in the middle of the bag which is a derivative of the International handle but adapted so it would lay flat, and the pockets which are all completely square whereas everybody else's pockets had rounded corners. The trim strip under the handle was also said to be unique. A rectangular patch with an oval-stamped Hartmann or embossed Hartmann logo "h" was said to be an additional feature that made the hanger bag recognizable. (FF 124).

(c) Carry-on bag

According to complainant (CPFF 20):

> The trade dress of the Hartmann carry-on bags consists of the overall appearance of the product and includes as the most

> dominant features (a) the one and one-quarter inch trim strip going across the flap and (b) the lock flap sewn over that trim strip. . . .

Analogous to the situations with the alleged common law trademarks for the attache and hanger bag, the record shows an uncertainty as to the nature and scope of the alleged trademark for the carry-on bag. Ms. Penix testified that she would not attempt to dissect the look of the C3 carry-on bag which was introduced by Hartmann in 1979. (FF 57). Although complainant states that the design of the C3 bag has remained unchanged since its introduction in 1979 (CPFF 19), Ms. Penix testified that there has been a "minor zipper modification." (FF 112). She also testified that handles that come up from the bottom of the carry-on and become attached by a saddle with snaps on either side were unique to the original version of the C3 carry-on bag, viz. the CM/CW bag, (FF 57) and she included the Hartmann logo as a dominant feature of the C2 and C3 carry-on. (FF 284).

Robert Davis, who designed the Hartmann carry-on C3 bag, noted the following features of the Hartmann look in the C3: the stitched leather straps with the saddle handle, the flap with the prominent trim on the flap, the lock cover and the color coordinated zippers to coordinate with the piping, trim and straps of the carry-on. (FF 180). He also believed that the color coordination between the welting, piping, trim, leather covers and zippers are parts of an instantly recognizable appearances of the carry-ons and the hanger bags. (FF 183). He further testified that part of the distinctiveness and instantly recognizable appearance of the Hartmann carry-on bags includes the square facial appearance. (FF 283).

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(d) Soft Pullman

According to complainant (CPFF 21):

> In 1983, Hartmann designed soft pullman suitcases which used the overall appearance and dominant elements of the attache case and the hard suitcases of the International series, namely the same figure-8 saddle handle with a raised ridged, the lock flaps and the square look. . . .

There is some uncertainty in the record as to the nature and scope of the alleged common law trademark for the soft pullman. Ira Katz, president of Hartmann for a number of years (FF 35), testified that the features of the soft pullman that are instantly recognizable, in addition to the handle, square corners, and the lock straps, are the trim strips and probably the covering material; that Hartmann's belting leather is very unique; that Hartmann's vinyl is a high-quality vinyl but not unique in the same sense; and that no one else is using Hartmann's tweed. (FF 121).

Robert Davis testified that the dominant features of the look in the pullman include the rivets in the saddle and the rivets on the side. (FF 187). He also testified that a dominant feature for the soft pullman suitcase, as well as for the attache, is the binding around the side that creates a drop-in panel effect. (FF 281).

II. Protectible Common Law Trademark

A trademark is defined at common law, as it is under the Lanham Act, as: "any word, name, symbol, or device, or any combination thereof, adopted and used by a manufacturer or a merchant to identify his goods and to distinguish them from those manufactured or sold by others." 15 U.S.C. § 1127; 1 McCarthy, Trademarks and Unfair Competition, § 3:1 (2nd Ed. 1984); Certain

Woodworking Machines, Inv. No. 337-TA-174, Majority Opinion at 6 (1985) (Woodworking Machines).

A common law trademark is deemed established and protectible upon proof that: (1) complainant has the right to use the mark, (2) the mark is inherently distinctive or has acquired a secondary meaning, (3) the mark is not primarily functional; and (4) the mark has not acquired a generic meaning. Woodworking Machines, Id. at 6; Certain Miniature Plug-In Blade Fuses, 221 U.S.P.Q. 792, 804 (1983) (Fuses); Certain Cube Puzzles, 219 U.S.P.Q. 322, 326 (1982) (Cube Puzzles). For protection under section 337, a common law trademark must meet those criteria. Fuses, 221 U.S.P.Q. at 804; Cube Puzzles, 219 U.S.P.Q. at 326.

The Federal Circuit and the Commission have recognized that a common law trademark may exist in the overall appearance of a product. Textron, Inc. v. U.S. International Trade Commission 753 F.2d 1019, 224 U.S.P.Q. 625 (Fed. Cir. 1985) (Textron),[8/] Certain Vacuum Bottles, 219 U.S.P.Q. 637, 641 (1982) (Vacuum Bottles).

8/ In Textron, although the Commission in the appealed from opinion in Certain Vertical Milling Machines 223 U.S.P.Q. 332 (1984) (Milling Machines) recognized the existence of a common law trademark in an overall appearance, it found no common law trademark existed in the product in issue because of complainant's failure to show that the product's overall appearance was inherently distinctive or had acquired secondary meaning, i.e. an association in buyers' minds between the alleged mark and a single source of the product. Although the Federal Circuit agreed with the Commission that complainant had not shown that the product design was entitled to common law trademark protection it found the result was more properly arrived at by applying the doctrine of functionality.

Complainant's Right to Use the Alleged Common Law Trademarks

A person claiming a trademark must establish that he has a right to identify his product by the mark. Prior use by another, without abandonment, may bar this right. Cube Puzzles, 219 U.S.P.Q. at 326.

In this investigation the record establishes that complainant's former employees' Messrs. Katz and Robert Davis were responsible for designing the Hartmann products at issue. (FF 262). There is no contention that complainant does not have the right to use the three alleged common law trademarks because of any prior right of another and the record is devoid of any evidence that would support such a contention.[9]

Accordingly the administrative law judge finds that complainant has the right to use the three alleged common law trademarks in the overall appearances of its attaches, carry-on bags, soft pullman bags and hanger bags.

Inherently distinctive

An inherently distinctive trademark is a mark that achieves instant recognition as a trademark denoting origin because the mark is fanciful,

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[9] Respondent Starco, citing Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1963), Compco Corp. v. Day-Brite Lighting, 376 U.S. 234 (1963) and Gemveto Jewelry Co., Inc. v. Jeff Cooper Inc., 230 U.S.P.Q. 876 (Fed. Cir. 1986), argued that complainant has no legally protectible right in this investigation because the attache configuration, Starco's only exposure, is the subject of expired patents. (RPost at 1-4). The administrative law judge however finds that the Sears and Compco cases would not bar complainant from obtaining common law trademark protection in the overall appearances of its luggage products because Starco's cited authorities did not deal with protection under section 43(a) of the Lanham Act. Vacuum Bottles, 219 U.S.P.Q. at 641; McCarthy, supra, § 7:33 (C). The Gemveto case is inapposite. In that case the district court had specifically dismissed the

(Footnote continued to page 17)

arbitrary or suggestive. The design of a inherently distinctive trademark must be such that its distinctiveness is obvious at the time of adoption and first use. Milling Machines, 223 U.S.P.Q. at 337; Federal Glass Co. v. Corning Glass Works, 162 U.S.P.Q. 279, 283 (T.T.A.B. 1969), McCarthy, supra, § 11.2.

An inherently distinctive product configuration is relatively rare. McCarthy supra § 7.31. Thus the Commission has uniformly held product configurations descriptive and weak and required that there be evidence of secondary meaning for the configurations to receive trademark protection. Certain Novelty Glasses, 208 U.S.P.Q. 830 (1979) (Glasses); Vacuum Bottles, 219 U.S.P.Q. at 642; Cube Puzzles, 219 U.S P.Q. at 328; Fuses, 221 U.S.P.Q. at 803; Certain Sneakers with Fabric Upper and Rubber Soles, 5 ITRD 1226 (1983); Certain Braiding Machines, Inv. No. 337-TA-130 (unreviewed initial determination); Milling Machines, 223 U.S.P.Q. at 337; Certain Heavy Duty Staple Gun Tackers 6 ITRD 1623 (1984) (unreviewed initial determination).[10/]

(Footnote continued from page 16)
Lanham Act claim because Gemveto failed to show that the feature sought to be protected was nonfunctional and enjoyed secondary meaning. Moreover the Federal Circuit made it clear that the involved jewelry revolved around products, not trademarks. Id. 230 U.S.P.Q. at 878, 879.

[10/] Complainant argued that in CPG Products Corporation v. Pegasus Luggage, Inc., 776 F. 2d 1007, 1012, 227 U.S.P.Q. 497, 501 (Fed. Cir. 1985) the design of a suitcase was held to be "distinctive and memorable" and therefore was found not to require secondary meaning to operate as a protectible common law trademark. (CPost at 12, 13). However in that case Chief Judge Markey and Judge Friedman, as a matter of pendant jurisdiction, applied the law of the

(Footnote continued to page 18)

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With respect to the alleged common law trademark for the attache, complainant argued that Mr. Katz, the former president of Hartmann, testified that the design of Hartmann's attaches appears different from the design of any other attaches on the market; that Ms. Penix, who is Hartmann's Vice President (FF 36), and Robert Davis, who was employed by Hartmann for seventeen years and had responsibility for design of Hartmann's luggage products (FF 168), both testified that the design of Hartmann's attache has been unique and distinctive and did not resemble other products on the market when the design was introduced; that Michael Davis, respondent Starco's expert, testified that Hartmann was the only one to use a figure-8 saddle handle with a raised ridge, a drop-in panel with a bumper binding, lock flaps and an external valance on attache cases; and that respondent K mart's employees Messrs. Gallup and Sales stated that they did not know of any other attache case on the market using the Hartmann figure-8 saddle handle or the lock flaps. It is argued that there is no evidence that any competitor of Hartmann, other than the respondents involved in this investigation, has

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(Footnote continued from page 17)
Eleventh Circuit not the law of the federal circuit. They observed that it was the district court which found the design "memorable and distinctive" and that on the record, under the appropriate appellate standards, there was no basis for holding that the district court's judgment was clearly erroneous. Whether Judges Markey and Friedman might, were they sitting at trial, have reached different findings and conclusions was said not to be the test for their appellate review. Id. 776 F.2d at 1011, 227 U.S.P.Q. at 499. In the CPG case Judge Rich dissented on the trademark infringement issue stating that the law in the Federal Circuit is no different but found that complainant had not produced any evidence to show either secondary meaning or likelihood of confusion. Id. 776 F.2d at 1017, 1018, 227 U.S.P.Q. at 497,504.

employed a design similar to the overall design of Hartmann's attache. (CPost at 10, 11).

With respect to the alleged common law trademark for the hanger bags, complainant argued that Ms. Penix and Robert Davis testified that the appearance of Hartmann's hanger bags was unique until its copying by the respondents; that Hartmann submitted the hanger bags of three of its competitors to show the quite different designs and how they do not look like the Hartmann hanger bags; that the staff has submitted no evidence of sales of hanger bags to establish that the Hartmann hanger bag was not unique; that only Hartmann used the unique design of its hanger bags until its copying by respondents in 1983; and that the evidence shows that during a ten-year period of use the overall design of Hartmann's hanger bag was unique. (CPost at 11).

With respect to the alleged common law trademark for the carry-on bags, complainant argued that the bag was unique in appearance in the field at the time it was designed in 1973; that since then many other carry-on bags on the market have not looked like the Hartmann carry-on bag or adopted its particular features; that Robert Davis testified that competitors who sold carry-on bags did not use the Hartmann trademark for their products; and that the staff has offered no evidence of sales of carry-on bags which would establish that Hartmann's overall appearance is not unique. (CPost at 12).

Complainant argued that the overall appearance of the Hartmann soft pullman suitcases virtually duplicates the design used by Hartmann for its hard suitcases since 1963 and is likewise supported by the inherent distinctiveness of the International series since 1963. (CPost at 12).

The staff argued that the alleged common law trademarks of the four Hartmann luggage items in issue are not inherently distinctive because a review of other attaches, carry-ons, hanger bags and soft pullmans in the market supports that conclusion. Thus it argued that the products which compete with each of the Hartmann luggage pieces in issue have the same general appearance because they are all designed to serve the same purpose, e.g., an attache carries papers and documents, a hanger bag carries suits and other clothing; and that while there are variations in the appearances of certain features of the luggage of Hartmann's competitors, the differences are not sufficient to render the appearances of any of the alleged common law trademarks of complainant's luggage "inherently distinctive."

The staff further argued that the lack of inherent distinctiveness of the Hartmann luggage is exemplified by the many functional aspects of the luggage and that, in fact, many of the features claimed by complainant to comprise its alleged common law trademarks, e.g., the square look, the handle, the lock flaps on the attache, and the trim strips on the carry-on, serve as utilitarian design features which cannot be claimed as inherently distinctive. Finally it is argued that it cannot be presumed that the trademarks in issue are inherently distinctive when it is clear that the luggage is always sold and advertised in connection with the well known "Hartmann" word mark and that in those circumstances there must be evidence, which is lacking in this investigation, that the alleged common law trademarks create a commercial impression separate and apart from the word mark in order for the alleged common law trademarks to be protectible. (SPost at 9-11).

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The test of the inherent distinctiveness of an overall appearance of a product, alleged to be a common law trademark, which the Commission has employed, is whether the overall appearance is so unique in its field that the reaction of the average purchaser as to origin indication may be presumed. Vacuum Bottles, 219 U.S.P.Q. at 642 and Cube Puzzles, 219 U.S.P.Q. at 327 (both citing In re Days-Ease Home Products Corp., 197 U.S.P.Q. 566 (T.T.A.B. 1977). The test involves the average purchaser's reaction or ultimate consumer's reaction to the trademark as an origin indication of the product. See Anheuser-Busch, Inc. v. Bavarian Brewing Co., Inc., 120 U.S.P.Q. 420 (C.C.P.A. 1959); American Luggage Works, Inc. v. U. S. Trunk Co., Inc., 158 F. Supp. 50, 116 U.S.P.Q. 188, 190 (D. Mass. 1957), aff'd sub nom. Hawley Products Company v. U.S. Trunk Co. Inc., 259 F. 2d 69, 118 U.S.P.Q. 424 (1st Cir. 1958); Clairol Inc. v. Gillette Co., 389 F. 2d 264, 156 U.S.P.Q. 593, 599 (2nd Cir. 1968).

In applying the average purchaser test, and determining whether a mark is inherently distinctive, the Court of Customs and Patent Appeals (a predecessor court to the Court of Appeals for the Federal Circuit) looked to whether the mark was

> [a] 'common' basic shape or design, whether it was unique or unusual in a particular field, whether it was a mere refinement of a commonly-adopted and well known form of ornamentation for a particular class of goods viewed by the public as a dress or ornamentation for the goods, or whether it was capable of creating a commercial impression distinct from the accompanying words.

Seabrook Foods, Inc. v. Bar-Well Foods Ltd., 196 U.S.P.Q. 289, 291 (C.C.P.A. 1977).

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At the outset there is no evidence in the record which establishes that average purchasers, when the alleged common law trademarks were adopted and put in use, identified the trademarks as indicating a single source for the associated luggage.[11/] Moreover the administrative law judge finds that in the overall appearances of non-accused luggage products of complainant's competitors and/or of luggage products existing before the adoption of any of the alleged trademarks in issue,[12/] there existed square attaches in durable fashionable leather-like vinyl and attaches with strong padded handles comfortable to carry (FF 258); that non-accused trimmed square carry-ons with zippers and with saddle handles that can come up from the bottom of the carry-ons and become attached to form the saddle handles existed (FF 259); that just about everyone in the luggage industry, including non-accused competitors, makes a square looking attache (FF 260); and that the square look in certain luggage existed before adoption of the alleged trademarks (FF 38, 39) as did a figure 8 saddle handle, soft panel luggage construction, and outside valance. (FF 47). In addition, a 1985 Hartmann brochure refers to "Hartmann's famous hand-sewn Italian style handles". (FF 77). Complainant's Katz testified that the Italian handle had a figure-8 loop; that this is a basic configuration of the International handle which was inspired by

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11/ See Milling Machines, 223 U.S.P.Q. at 339

12/ The Commission has compared the configuration of a domestically produced product with that of its non-accused competitors and made a determination of nondistinctiveness based in part upon such a comparison. See, e.g., Staple Gun Tackers, 6 ITRD at 1635, 1636; and Vacuum Bottles, 219 U.S.P.Q. at 647.

the Italian handle. (FF 47). A Newsweek ad, put in by complainant, stated that the Hartmann International Series is a line of luggage made originally only of vinyl or fabric covering "in the classic square shape, and flexible frame construction of the Skymate [an earlier luggage piece manufactured by Hartmann]". (FF 101).

There is also evidence in the record that certain, at least, of the alleged dominant elements of the overall appearances said to be included in the alleged trademarks in issue are adapted to the function the products perform and do not have the sole purpose of designating a single origin.[13/] For example, complainant alleges that the dominant elements of the alleged common law trademark for the Hartmann attache are "(a) the figure-8 saddle handle with a raised ridge in the center of the handle, (b) the lock straps emanating from the handle and going around and being secured at the sides and (c) the square shape of the product" (CPFF 7); that the dominant elements of the alleged trademark for the hanger bag include the figure-8 saddle handle (CPFF 14); that the dominant features of the alleged trademark for the carry-on bag include the lock flap sewn over the trim strip (CPFF 20); and that the dominant elements of the soft pullman are the figure-8 saddle handle, the lock flaps and the square look. (CPFF 21). Mr. Katz, Hartmann's president for many years, testified that the Hartmann Skymate, a bag which preceded the Hartmann attache case, was the most functional bag made by

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[13/] Milling Machines, 223 U.S.P.Q. at 338; Vacuum Bottles, 337-TA-108, (initial determination at 33).

Hartmann in the early sixties because obviously with square corners you can pack more (FF 39); that the square corners in the attache have a functional advantage in that they pack more in cubic capacity (FF 47); and that the "Hartmann look is a very functional look" and the rivet is a sign of strength and hence the rivet was left exposed in the overall appearance of the attache. (FF 44). Katz also testified that in the early sixties when the trademark for the Hartmann attache was adopted, 70 percent of all the trouble with luggage was in the locks being knocked off. Hence he testified that the Hartmann attache with the alleged trademark has a recessed patented lock covered with a lock flap. (FF 47). Ms. Penix, Hartmann's vice-president, testified that the figure-8 saddle handle on the attache is a comfortable handle. (FF 53). Hartmann luggage advertisements stated that "When we make Hartmann luggage, we never cut corners. We keep them nice and square. And for good reason. There's less wasted space in square corners. So you can pack more" (FF 67);[14/] "Comfortable Handles. Hartmann's . . . . handles always remain comfortable and they're bolted all the way through the frame for exceptional strength and durability" (FF 77); "Patented Touch-O-Matic. Hartmann locks open and close with one simple touch. They're recessed and covered with flaps for extra protection to prevent damage to the lock - the source of most trouble with other luggage" (FF 80); "Soft, padded,

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[14/] Robert Davis testified that one of the reasons square corners are advertised by Hartmann is that more contents can be put into the attache. (FF 248).

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contoured hand-stitched handles ensure that each [Hartmann] attache is comfortable to carry" (FF 83); "And while those fashionable outside flaps cleverly hide our TOUCH-O-MATIC locks . . . " (FF 85, 101); "A choice of handles lets you carry it [Hartmann hanger bag] comfortably either folded or long" (FF 87); "Our 24 K gold finish TOUCH-O-MATIC locks are covered with a fashionable flap. Protected from bumps and international jewel thieves" (FF 88); "TOUCH-O-MATIC locks finished in 24 K gold, then covered by flaps to keep the case neat and the locks safe" (FF 90); "Inspect the handles and you'll find that they've been shaped and sewn by our hands so they'll be comfortable in yours" (FF 92); "Feel the corners and you'll find them square, not round. That creates space when you need it", "Tap the sides. They're soft so they swell out while you're packing things in," "Even the locks are specially crafted for durability and protection" (FF 92); "And why our handles are hand-sewn to be softer, wider and with extra knuckle room," "It's [hanger bag] been ingeniously designed to let you carry lots more than just six dresses," "And there's a big flap pocket for loads of extras. All without a big bulge" (FF 93); "The secret, a triumph of function and style, durability and beauty, good looks-and brains" (FF 67); (FF 92); "You can pack much more, much more neatly into square corners of a box which is why Hartmann is designed like a box" (FF 94); "You'll be surprised how much more you can pack into Hartmann's square corners - and how neatly it all stays packed. And our classic square-cornered styling makes Hartmann the most distinctive choice for packaging, protecting and transporting garments" (FF 96); "unparallelled strength and flexibility" (FF 98); "Bump the identical frames and they'll

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swell out to hold more in. There's even the extra packing space in their square corners" (FF 101); "For a soft, supple surface that's extraordinarily resistant to scratches," (FF 65); "Our handles aren't ground out by machine, either. They're carefully sewn by our hands, so they're soft and comfortable for yours" (FF 101); and "TOUCH-O-MATIC locks finished in 24-K gold, then covered by flaps to keep the case neat and the locks safe. Classic square-corner shape and soft expanding side panels offer far more carrying space than hard-sided cases of comparable sized. Handle is sewn by hand instead of being machine-stamped. Soft, ridgeless, rugged". (FF 101).

There is an additional basis for finding that the alleged trademarks in issue are not inherently distinctive. In all of complainant's advertisements and brochures for the luggage in issue, there is found the Hartmann logo, the trademarked Hartmann slogan "We don't cut corners" and/or a reference to "Hartmann" (FF 64-69, 71-75, 77, 78, 85-102). Ms. Penix testified that the Hartmann logo and the trademarked slogan "We don't cut corners" is fairly typical for Hartmann's ads (FF 70); and that the slogan would contribute to consumer's identification with the products. (FF 64). The Hartmann logo can be larger than the regular type of the text. (FF 68). In addition the luggage in issue has the Hartmann name and when shipped from Hartmann has tags identifying Hartmann. (FF 138, 139, 140, 141). An "h" in an oval, a Hartmann trademark and the name "Hartmann" are widely used on all Hartmann products. (FF 141, 643). Lacking in this investigation is evidence that the alleged common law trademarks ever created a commercial impression separate from the "Hartmann" word identifications. See Petersen Mfg. Co. Inc. v. Central Purchasing, Inc., 740 F. 2d 1541, 222 U.S.P.Q. 562, 569 (Fed. Cir. 1984).

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Ms. Penix did testify that a Hartmann ad can "very dramatically" promote the overall appearance. However the ad in question did not show any complete overall appearances. (FF 67). The fan display of briefcases in another ad, said by Ms. Penix to be the ad's focal point, contained items not in issue. (FF 65). Another ad said to promote the Hartmann look showed a "seductive check" which has not been alleged to be a feature in the alleged common law trademarks. (FF 69).

Based on the foregoing, the administrative law judge finds that complainant has not sustained its burden in establishing that the alleged common law trademarks are _inherently_ distinctive.

Secondary Meaning

Since the administrative law judge has found that complainant's three alleged common law trademarks in issue are not inherently distinctive, complainant must prove that the trademarks are distinctive, i.e. that they have achieved secondary meaning in that, in the minds of the consuming public. the primary significance of the marks in issue are to identify the source of the product rather than the product itself. _Inwood Laboratories, Inc. v. Ives Laboratories, Inc._, 456 US 844, 214 U.S.P.Q. 1, 4 n.11 (1982). McCarthy, _supra_, § 15.1, 15.11. The product source need only be associated with a single source - not necessarily a known source. McCarthy _supra_, § 15.2.

No general rule can be enunciated by which it can be determined _precisely_ when a product's overall appearance acquires such distinctiveness that it can function as a trademark indicating a single source of origin for the product. Each case must stand on its own record.[15] However it is general rule that,

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[15] _See_ _Clinton Detergent Co. v. The Procter & Gamble Co._, 302 F.2d 745, 133 U.S.P.Q. 520. (C.C.P.A. 1962).

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the more descriptive the alleged mark is, the greater the evidentiary burden is to establish secondary meaning.[16/]

Complainant argued that the totality of direct and circumstantial evidence establishes secondary meaning. (CPost 49-52). In support it relies on a survey. It also relies on the long and extensive sales of the Hartmann products, the extensive national advertising featuring the Hartmann products, alleged deliberate and studied copying by the respondents, alleged continued use of the trademarks in issue by Hartmann for identification purposes, alleged testimony of customer recognition of the trademarks, and alleged acknowledgment of secondary meaning by respondents and others. (CPost 19-49).

The staff argued that complainant's survey, as designed and interpreted, is not reliable and, under those circumstances, is not probative evidence of secondary meaning. In support the staff refers to the eight guidelines of the Judicial Conference of the United States for assessing the admissibility of surveys, viz.

1. examination of the proper universe;
2. a representative sample drawn from that universe;
3. a correct mode of questioning interviewees;
4. a recognized expert conducting the survey;
5. accurate reporting of the data gathered;
6. sample design, questionnaire, and interviewing in accordance with generally accepted standards of objective procedure and statistics

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[16/] McCarthy, supra, § 15.10.

in the field of such surveys;

7. sample design and interviews conducted independently of the attorneys; and

8. interviewers trained in the field, having no knowledge of the litigation or the purpose for which the survey is to be used.

See Commission's opinions at 41 in Certain Single Handle Faucets, Inv. No. 337-TA-167 (1984) and at 80 in Metal Cutting Snips, Inv. No. 337-TA-197, USITC Pub. 1836 (1985). The staff's concerns regarding the objectivity, reliability and probity of the survey, and the manner in which its results were reported, are said to relate to the third, fifth and sixth guidelines. (SPost at 15-30).

The staff further argued that circumstantial evidence adduced by complainant is, in and of itself, insufficient to establish secondary meaning in the overall configurations of the four luggage products in issue. (SPost 31-35).

Respondent Starco argued that the Hartmann survey is fatally flawed in that the interviewed sample did not fairly reflect the general luggage-buying public and that the survey did not simulate actual purchase or use conditions. It also argued that the conclusions drawn by the survey are unsupportable. (RPost at 7-14).[17]

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[17] Respondent Starco's expert Dr. Daniel L. Kegan (FF 519) criticized the survey because it made no attempt to perceive consumer views on trade dress

(Footnote continued to page 30)

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(i) Complainant's Survey

Courts have said that the strongest and most relevant evidence as to whether or not a mark has acquired a secondary meaning, and hence constitutes a trademark, is evidence established by public opinion survey or poll. Levi Strauss & Co. v. Blue Bell, Inc., 216 U.S.P.Q. 606, 612 (N.D. Calif. 1982), Deere & Co. v. Farmhand, Inc., 217 U.S.P.Q. 252, 263 (S.D. Iowa 1982). In this investigation, at the request of complainant's counsel, a survey was conducted for complainant by Dr. Michael Rappeport (Rappeport), president of RL Associates, Princeton, New Jersey. Rappeport qualified as complainant's expert on market surveys. (FF 368). The stated goals of the survey included a determination of the degree to which products with the "Hartmann look and design" are identified by persons, who have shopped for or purchased luggage within the last year (FF 370), as comming from a single specific source, and a determination of whether the individuals surveyed identify the style or look of said products as unique to a single, specific source even though the individuals do not know or incorrectly identify the specific source. (FF 369).

A total of 1,198 interviews (each interviewee having shopped for or purchased luggage within the last year) was conducted in a total of 14

(Footnote continued from page 29)
prior to the date the respondents commenced using the marks in issue. (FF 521). See Brooks Shoe Manufacturing Co., Inc. v. Suave Shoe Corp., 215 U.S.P.Q. 358, 360 (S.D. Flo. 1[illegible]. Accused imports occurred as early as 1982. (FF 612). The survey was conducted in 1986. The infringement survey however was admitted into evidence since there does not appear to have been any dramatic change in the conditions in the market place between the time of initial infringement by each of the respondents and the time when the survey was conducted. See Palladino 73 TMR 391, 397 (1983).

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randomly selected major shopping centers distributed throughout the United States that drew people at all income levels. (FF 370, 379, 380, 390). They were upscale shopping centers in the sense that they were centers that appealed to a range of people. (FF 384). Generally speaking the shopping centers that were used in the survey had an interviewing service which had a place for interviewing, especially when materials were shown. (FF 381). The shopping centers used had stores that sold some luggage. Rappeport believed that the centers had at least one store that carried Hartmann luggage although he did not know that for a fact. (FF 382). In the survey, some 100 interviewers all over the United States, but whom Rappeport never met, were used. (FF 376). The actual surveys were conducted by independent survey companies unrelated to Rappeport's RL Associates. (FF 367).

After a qualitative interview phase conducted in January 1986 at which most interviews were held near or inside a few retail luggage stores, a questionnaire was developed for use in a second or pilot stage (FF 371, 372). The pilot stage interviews were conducted at three diverse shopping centers in February or March 1986 using only carry-on bags and hanger (or garment) bags. Thereafter a full-scale stage, involving the carry-on bag, the hanger bag and the attache, was conducted between August 6 and September 8, 1986. (FF 372). According to Rappeport the pilot rest results were included in the final results relied upon because precisely the same procedures, involving identical coded questionnaires, were used in the pilot and full-scale stages and because the pilot test results seemed to be favorable. (FF 373, 442).

The same Hartmann bag was not used in all of the shopping centers. For example in Colorado Springs, Ft. Lauderdale, Los Angeles, Chicago and

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Bridgeport a Hartmann fabric attache (CPX-33) was used while in Minneapolis, Detroit, Dallas and Livingston (New Jersey) a Hartmann vinyl attache (CPX-42) was used. (FF 390). In the interviews the identifying names and symbols on the luggage used were attempted to be covered or hidden. However it is known that in one or two cases the covering material came off. (FF 374, 405). Also an "h" for Hartmann was left showing on the zipper of the Hartmann hanger bag. Instructions were provided to interviewers. (FF 405). The interviewers were not told the purposes of the survey study, the survey's specific goals or the client's name. (FF 375). The interview was a very simple interview. A typical interview lasted only 10 to 15 minutes. (FF 377).

According to Rappeport the survey involved three "nested" hypotheses. The first hypothesis was that people simply knew the luggage as Hartmann luggage. The second hypothesis was that people knew the luggage was from a single source but did not know the name of that source. The third hypothesis was that people knew the luggage was made by several sources but also knew that the luggage had been made by a single source for a long time. (FF 406, 452). It was said by Rappeport that each of the three hypotheses tested single source identification and that results from all three were combined to support any conclusion. (FF 449).

Of the 1,198 interviewees who admitted that they shopped for or purchased luggage in the past year, 397 were interviewed with respect to a Hartmann attache in issue (FF 418, 419), a different 402 were interviewed with respect to the Hartmann carry-on bag in issue (FF 423, 424) and a further 399 (the remainder of the 1,198 interviewees) were interviewed with respect to the Hartmann hanger bag.

The following stages were used for conducting the secondary meaning portion of the survey (FF 392):

Stage 1

Each of the 1,198 interviewees was shown only the respective Hartmann bag (unidentified as Hartmann to the interviewee) and asked:

> 2. Can you tell me the manufacturer or brand name of this piece of luggage? (FF 392).

Stage 2

If the interviewee, when asked question 2, answered "Yes", the interviewee was then asked:

> 3. Which manufacturer or brand name is that? (FF 392)

and then was asked:

> 3A. Why do you say that? (FF 392).

For question 3A the interviewer in the questionnaire was told to "PROBE THOROUGHLY: What makes you say that?" (FF 392). The interviewee was then told that what the interviewee had been just shown was a Hartmann bag and the interviewer proceeded to question 5 (confusion portion of the survey). (FF 392).

Stage 3

If the interviewee, when asked question 2 (Can you tell me the manufacturer or brand name of this piece of luggage?), answered "No", the interviewee was asked:

> 4. Do you believe the respective Hartmann bag which looks like this is manufactured by one company or more than one company? (FF 392).

If the interviewee answered "One Company" the interviewee was then told that the interviewee had just been shown a piece of Hartmann luggage, and the interviewer proceeded to question 5 (confusion portion of the survey). (FF 392).

Stage 4

If the interviewee answered question 4 "More Than One Company", the interviewee was asked question 4A (FF 392):

> 4A. Do you believe that the respective Hartmann bag which looks like this originally was manufactured by one company and then was copied by other companies or that the respective Hartmann bag which look like this was never identified with one company?

The interviewee was then told that what the interviewee had just been shown was a Hartmann bag and the interviewer proceeded to question 5 (confusion portion of the survey). (FF 392).

As seen by the above, certain of the 1,198 interviewees were asked questions 2, 3 and 3A. Others of the 1,198 interviewees were asked questions 2 and 4 and still others of the 1,198 interviewees were asked questions 2, 4 and 4A. For all of those questions the interviewee was shown only the respective Hartmann bag. (FF 395).

According to Rappeport, survey questions 2, 3 and 3A involved "Recognition of the Hartmann Look by name;" and questions 4 and 4A as well as questions 2, 3 and 3A involved "The Hartmann Look as Originating from a Single Source," (FF 394).

With respect to Stage 2, and questions 2 and 3, Rappeport reported that 27 percent of the 1,198 interviewees, or 324 interviewees, answered that they could identify the manufacturer or brand name of the respective piece of Hartmann luggage shown them, and associated the luggage (hanger bag, carry-on bag, and attache) with the following manufacturers or brand names:

	Number	Percent
Hartmann	82	6.8
Samsonite	110	9.2
American Tourister	37	3.1
Oleg Cassini	9	0.7
Sassoon	11	0.9
Pierre Cardin	11	0.9
General Store Name	3	0.3
Other	62	5.2
Multiple Answer	(1)	(0.1)
No Association	874	73.0
Total	1,198	100.0

(FF 410).

As to each of the Hartmann hanger bags, carry-on bags, and attaches Rappeport's results were:

	Hanger Bag		Carry-On		Attache	
	Number	Percent	Number	Percent	Number	Percent
Hartmann	21	5.3	29	7.1	32	8.2
Samsonite	24	6.0	40	9.8	46	11.8
American Tourister	13	3.3	14	3.4	10	2.6
Oleg Cassini	3	0.8	4	1.0	2	0.5
Sassoon	3	0.8	7	1.7	1	0.3
Pierre Cardin	6	1.5	4	1.0	1	0.3
General Store Name	1	0.3	1	0.2	1	0.3
Other	24	6.0	26	6.3	12	3.1
No Association	304	76.2	286	69.8	284	73.0
Total	399	100.2	411	100.3	389	100.1

(FF 411).[18]

Relying on the 82 interviewees who answered "Hartmann" to question 3A, viz. "Why do you say that?", Rappeport concluded that "it is notable that virtually every individual [of the 82 interviewees] saying Hartmann describes some specific feature of the bag as their reason for believing the bag to be a Hartmann." (FF 413).

A necessary step in any trademark survey is establishing whether an interviewee associates the trademark in issue with a single source for the product rather than with the product itself.[19] The administrative law judge does not find it relevant that an interviewee described only "some specific feature of the bag" as reported by Rappeport. Assuming the feature is related to an alleged trademark in issue, there is evidence by complainant's own witnesses that a feature per se of an alleged trademark is not the trademark. For example although complainant has alleged that the square shape of the attache is one of the dominant elements of the alleged

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[18] There are certain errors in the above tabulation that have changed the results reported by Rappeport. Thus, for hanger bags, one interviewee said "Maybe Hartmann" (See survey 19013 (SRPX-4)). This response is found to be too indefinite to include and thus the Hartmann identification for hanger bags should be reduced from 21 (5.3 percent) to 20 (5.0 percent). For carry-on bags and attaches, Rappeport included in the carry-on bag results eight (See surveys 26043 to 26050 (SRPX-4)) that were coded as carry-on, but were, in fact, attaches. When the responses from these eight are correctly included with the attache results, the number of interviewees identifying a Hartmann carry-on as a Hartmann is reduced from 29 to 28, and the number of interviewees identifying a Hartmann attache as a Hartmann is increased from 32 to 33. In addition, the total number of carry-on interviewees is reduced to 402 and the total number of attache interviewees is increased to 397. These changes in turn affect the percentages in the above tabulation. (FF 412).

[19] See Palladino 73 TMR 392, 395, 397, 399.

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trademark, complainant's expert, Robert Davis, testified that it is possible to make a square looking attache which is not representative of the alleged common law trademark; that there are several square - shaped attaches in the non-infringing Amelia Earhart luggage, with some actually more square than the Hartmann attache (FF 258); that one or two features on an attache, common to features of the alleged trademark, does not mean that it is a copy of the alleged trademark. (FF 280). He also testified that it is possible to make a carry-on with straps and saddle handles without the alleged common law trademark. (FF 259, 260). Superior quality is a characteristic of the Hartmann attache. However, as Ms. Penix, Hartmann's senior vice president (FF 36) testified, quality by itself has nothing to do with the common law trademarks in issue. (FF 105). Color also can be feature of the Hartmann attache. (FF 182). However color, per se, is incapable of appropriation as a trademark.[20/]

Because the administrative law judge finds the survey critical to the issue of secondary meaning, duplicated below (with the original spelling), with respect to the attache, are the reasons the 33 interviewees gave for stating "Hartmann" in answer to question 3:

[20/] McCarthy, supra §7.16. Rappeport testified that a unique color is "probably not protectible, but it still says who the -- it still has secondary meaning." Rappeport did not identify what the color has a secondary meaning for. (FF 471).

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Q NUMBER	WHY DO YOU SAY THAT?	Q NUMBER	WHY DO YOU SAY THAT?
30103	It Looks very much like it, sturdy-well made, stylish, quality material	30223	I know the style, I recognize it right away
30104	I've bought Hartman before. They all look alike	30229	I just bought luggage a few weeks ago.
		30231	I just saw them in a store
30106	I recognize it as Hartmann because of the leather and the brass snaps	30243	I see'n many attace cases and this one seems expensive mean they look alike
30110	Hartman has this texture of luggage & Brown leather also	30245	I just know luggage (we ne)
30117	I have looked at their luggage before. Its apparent because the tweed & leather gives it away too.	30248	the tweed, the leather striping (we) the belt look, (we ne)
30124	I just think it made by a company that begins with a H because of its canvas & leather appearance	30302	They are the ones with the cloth side and the leather trim (else) they do good work and it looks strong (else) nothing
30210	We seen it in a do (w/e) n/e	30325	It looks like a Hartman the way the texture is its built also.
30211	I recognize it - and I just brought some Hartmann luggage (we ne)	30328	Its square box with olathin fiber with leather handles
30216	I recognize the style with the leather and cloth (w/e) n/e	34029	It has thier styling, snaps and handel
34030	Shape and I have one	36041	I bought a whole set of it for my daughter when

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			she went to college
30504	I had one like this.	26046	Because I know the style I just bought one for my husband. The same thing
30551	Good Quality (P) Real leather as oposed to vinal.	37013	The shape (we) the detailing, the handle, (we) nothing
35007	I think my brother has one (P) Ive seen one styled like that	37020	Because they way it's made (now) well (mean) durable (else) nothing
36009	The way it is built and you know the feeling is real leather & the hardware also non	37023	We bought a hartman attache case (else) It's the best (way) The quality (else) nothing
36014	Looks like its well made & has a good frame the color is similar	30732	Because of the looks of it (why) the leather structure. The only part that doesn't look right is the plastic piece (else) nothing
36015	Because Ive looked at them before I liked it but the leather takes a beating so do not think Id buy it again no more	37033	Because I know the construction of hartman is boxy (else) I know they're heavier than most (else) nothing

(FF 422).

Rappeport's stated purpose for asking question 3A ("Why do you say that?") was as a control to determine how much guessing was occuring. (FF 439). However the responses to question 3A also are indicative of the reasons why the 33 above interviewees stated "Hartmann," or, why certain other interviewees stated another brand name. See FF 422 for those stating another brand name as to attache. Thus their responses have a bearing on whether the interviewees associate the alleged trademark in issue with complainant's attache.

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The administrative law judge finds the above responses have little bearing in establishing whether the interviewees associate the alleged trademark with complainant's product. Thus while complainant has alleged in CPFF 7 that the common law trademark of the Hartmann attache consists of the overall appearance of the products *and* includes the dominant elements of (a) the figure-8 saddle handle with a raised ridge in the center of the handle, (b) the lock straps emanating from the handle and going around and being secured at the sides and (c) the square shape of the product, only *two at most* (30328, and 37013) of the 33 above interviewees identified possibly two of what complainant has alleged are the three dominant elements of the trademark. Even here the identifications were in a general sense.

With respect to Rappeport concluding that virtually everyone of the 33 above interviewees described "some specific feature of the bag", one interviewee (34030) did state "Shape and I have one" and another (37033) "boxy." However, as complainant's expert Robert Davis testified, the alleged common law trademark is not associated with merely a square looking attache. (FF 258). Interviewees stated "quality material (30103);" "Good Quality (30551);" "the quality" (37023); "durable" (37020); and "texture" (30325). However, as Ms. Penix testified, quality by itself has nothing to do with the common law trademarks in issue (FF 105). Quality is not the trademark. It may be a function of a trademark.[21] Other interviewees referenced what is

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[21] A trademark can serve to denote a consistency of quality among the goods sold under the mark. Quality, as well as source, can be functions of the trademark. *See* McCarthy *supra* §3.4.

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merely descriptive of a characteristic of the attache. See 30117 "tweed & leather gives it away too";[22] 30124 "its canvas & leather appearance", 30216 "the leather and the cloth", 30551 "real leather as opposed to vinyl", 30732 "the leather structure" and 30302 "They are the ones with the cloth side".[23]

Some of the above interviewees stated "it looks very much like it" (30103), "they all look alike" (30104), "I recognize it right away" (30223), "I recognize it" (30211), "I just know luggage" (30245), "I see'n many attace cases and this one seems expensive mean they look alike" (30243), "because Ive looked at them before" (36015). Are the interviewees so responding, for example, because of Hartmann ad promotions that leather is part of the overall appearance (FF 65); that the product contains Hartmann's "famous industrial belting leather" (FF 68); or that it is the materials which make the Hartmann instantly recognized. (FF 123). The record is unclear. Rappeport, in justifying that such responses associate the alleged common law trademark with

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[22] Tweed is not used in all of the Hartmann attaches alleged to have the identical common law trademark - compare CPX-5 which is a Hartmann attache in walnut tweed and CPX-2 which is a Hartmann attache in belting leather. CPX-2 has no tweed. Yet both CPX-2 and CPX-5 are alleged by complainant to contain the identical common law trademark in issue.

[23] The Hartmann attaches which are alleged by complainant to have the common law trademark do not all have real leather nor do they all have a cloth side. Thus, while CPX-3 is a Hartmann attache in belting leather, CPX-4 is a Hartmann attache in vinyl, and while CPX-5 is a Hartmann attache in walnut tweed, CPX-3 is a Hartmann attache in belting leather. Yet CPX-3, CPX-4 and CPX-5 are alleged by complainant to contain the identical common law trademark in issue.

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a single source, testified that the interviewee may "even not konw consciously why he knows it's a Hartmann" (FF 469); that "[w]hat is indicative of secondary meaning is that they recognize this case. Whether or not they can specifically explain why they are recognizing this case, they claim to recognize the case." (FF 492). A trademark survey however is suppose to associate the trademark with the product. The record does not establish how a mere recognition, without knowing if the recognition is because of the alleged trademark, is indicative of secondary meaning for the trademark. 24/

Rappeport is of the opinion that a response "I think my brother has one we seen one styled like that" (35007), or "Because I know the style I just bought one for my husband" (26046) is indicative of secondary meaning for the alleged trademark. (FF 492, 493). Thus if Rappeport is correct, it is unnecessary in any trademark survey to establish whether an interviewee associates the common law trademark with a single source. It is only necessary to associate a feature of the product, whether or not it identifies or is even a part of, the common law trademark. Moreover as the above table shows, according to Rappeport it is unnecessary to associate the common law trademark with even a feature of the trademark or product. Thus Rappeport testified that the following answers to question 3A showed a single source and

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24/ Dr. Kegan, Starco's expert on market surveys, testified that the Rappeport survey made no distinction between protectable trade dress and nonprotectable elements, including functionality. (FF 519, 534).

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supposedly associated the common law trademark with a single source: "my brother has one" (35007); "I just know luggage" (30245); "I bought a whole set of it for my daughter when she went to college" (36041); "we bought a Hartmann attache case" (37023); "I just bought luggage a few weeks ago" (30229); "I just saw them in a store" (30231); "I just bought one for my husband" (26046); "because I've looked at them before I liked it" (36015); or because "I had one like this" (30504). Without further probing questions (the interviewer in the questionnaire was directed to PROBE THOROUGHLY (FF 392), the administrative law judge finds that these answers have little relevancy in establishing that the common law trademark, as defined by complainant, has a secondary meaning.[25/][26/]

A tweed fabric Hartmann attache was shown to interviewees in Chicago, (FF 390). If for example, the answers on 30223, 30229, 30231, 30243, 30245

[25/] With respect to survey 35044 ("3" indicating attache) in response to questions 3 and 3A the interviewee stated "Samsonite" because the attache looked like Samsonite. When Rappeport was asked why 35044 was coded as indicative of secondary meaning for the alleged common law trademark and not coded as a guess, he testified:

> A. Because it looks like - - it's what the whole case is about. I mean, everything is a guess if they get the wrong answer in the sense they didn't say Hartmann, but looks like is what the case is about, so it's not a guess in that sense. (FF 488).

The administrative law judge does not understand how a bag which has been identified as a Samsonite because it looks like a Samsonite establishes that the alleged common law trademark has a secondary meaning.

[26/] The administrative law judge has some doubt about the professionalism of

(Footnote continued to page 44)

(02 identifies Chicago FF 397) are attributed to the tweed fabric, it is not seen how the answers are relevant because tweed is not a common element of the allege common law trademark. Thus there is a vinyl attache (CPX-4), and leather attache (CPX-3) in addition to a tweed attache (CPX-5). Each of said attaches is alleged by complainant to have the identical common law trademark. Moreover complainant's expert Robert Davis testified that an attache without the figure-8 handle, lock flaps and with rounded corners but in walnut tweed is not a copy. (FF 205).

Alternatively the answers on 30223, 30229, 30231, 30243 and 30245 may be, for example, due to very little hardware showing, as Hartmann's Katz testified is part of the Hartmann look (FF 48) or because the "Hartmann look is a very functional look" and the rivet is a sign of strength as Katz also testified, (FF 44) or as complainant's expert Robert Davis testified the hardware is substantial. (FF 280). In the absence of further probing questions, the administrative law judge finds that the answers on 30223, 30229, 30231, 30243 and 30245 do not establish that the alleged trademark has acquired a secondary meaning.

Complainant alleged the trademark of the Hartmann carry-on bag consists of the overall appearance of the product and includes as the most dominant features (a) the one and one-quarter inch trim strip going across the flap and (b) the lock flap sewn over that trim strip. (CPFF 20). The following are the reasons the 28 interviewees gave for stating "Hartmann" in answer to

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(Footnote continued from page 43)
the interviewers. For example the stated reason in 30210 is not intelligable. There are also several mispellings See 30110, 30211, 30243, 30551, 30325, 34029, 36009, 37020, 37023, 30732, 37033, 30104. Rappeport was unable to read all the words on 25019. (FF 492). There also were miscodings. (FF 412).

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question 3 (FF 427):

Q NUMBER	WHY DO YOU SAY THAT?	Q NUMBER	WHY DO YOU SAY THAT?
20105	Cause of the color & Tan straps	20321	Because I know a Hartman when I see one. (w/e) nothing
20112	I've seen somelike this	20327	It looks like a Hartman
20114	Because of leather & brass & snap also trim.	20328	Because it looks like a Hartman
20314	Because of the leather handle with the enclosure around it.	20339	I just know what it looks like it's distinctive, the nice heavy leather the brass is strong its good quality light weight and durable (w/e) nothing
20410	The style reminds her of Hartmann	21026	It looks like Hartman, high quality
20414	Color-leather trim	22001	I have Hartmann Hand material I would buy it look at leather quality and the detail of it
20417	It looks like the Hartmann I've seen in the store real leather trim	23009	The leather, I was at some and it was like that
20419	I know the quality of Hartmann and it looks like Hartmann.	25019	They only work in leather, they only use the type of nylon material
20423	Leather, trim, color	27010	Quality it's a soft material (we) leather (ne) nothing
20546	Because I have one.	27016	Because it looks similar to one (why) the leather trim and the color of the bag (else) nothing

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21022	The zipper has their insignia (on front)	27040	The color & the trim (How) It's Khaki and its has leather trim (we) nothing
21023	Because of the leather trim and the color of the leather trim and I've seen it in ads	28015	I've got a piece similar to it. Looks like it.
21024	He owns one, color, shape etc;	28035	From the style and color of it. (u/s) It just looks like Hartmann. (w/s). The leather binding. (w/e) NC.
21025	Quality, leather, stitchings, looks expensive	28044	We bought Hartman & it looks alot like that one (w/e) N/E

The administrative law judge finds that not one of the 28 above interviewees associated the carry-on bag with both alleged dominant elements of the common law trademark for the carry-on, viz. the one and one-quarter inch trim strip going across the flap and the lock flap sewn over that trim strip. Seven interviewees did mention "trim" (20114, 20414, 20417, 20423, 21023, 27016, 27040) but made no attempt to state what the trim was even though the interviewer was directed to probe thoroughly. (FF 392).[27/] Not one of the 28 above interviewees made a reference to the lock flap sewn over a trim strip, alleged by complainant to be a dominant feature. Moreover one of the interviewees (21022) stated that the "zipper has their insignia (on front)"

[27/] The instructions to the interviewer stated "PROBE THOROUGHLY". (FF 391). According to Dr. Kegan, Starco's expert on market suverys, this language means that even a moderately experienced interviewer keeps using the phrase "what makes you say that?" until a satisfactory answer is obtained. (FF 519, 524).

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which zipper was left uncovered in the survey. Dr. Kegan, testified that showing the insignia in the survey created serious doubts about the survey's reliability. (FF 532). It is not known how many interviewees in their answers were influenced by the Hartmann insignia on the zipper.

Complainant argued that the trademark of Hartmann's hanger bags in issue consists of the overall appearance of the products and includes the dominant elements of (a) the flattened version of the figure-8 saddle handle with simulated lock flaps and (b) double buckles on the lower pocket flap or flaps. (CPFF 14). The following are the reasons the 21 interviewees gave for stating "Hartmann" with respect to the Hartmann hanger bag (FF 430):

Q NUMBER	WHY DO YOU SAY THAT?	Q NUMBER	WHY DO YOU SAY THAT?
10209	Basicly the type of leather (why) I own hartman (w/e)n/e	12003	I have a Hartmann wallet and it has some of the qualities like finished leather the sewing & the padding.
10220	The style & colors (why) It just seems that way (w/e)n/e	13001	Its got the leather on it. I saw some others and they didn't have any
10240	It looks like the same color, with leather trim. I have seen many like it before.	13002	I don't know its the first thing that came to my mind. Its good stuff. (mean) High quality
10406	Looks like their luggage. High styling, quality	14007	They make alot of leather.
10433	I've seen it before Good Quality	14029	We have a piece of HARTMAN luggage. I like it a lot - nice size - built well -

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			functional. Would buy the FULL LINE if it were not so expensive. Good in every way.
10543	Only brand I buy.	16046	Leather straps looks like good workmanship, good lines and sturdy
10546	Because it's good quality (P) I have one.	18034	I have some that looks similar (w/e) well made stands up, you can tell its Hartmann Its stronger than most (u/m) stand up longer.
11024	Because I have one	18042	Its well made & looks like a Hartmann I bought. (w/e) N/E
11025	Same color as most Hartmann's and hook	19013	I think I had one that looked like that, tan and leather. (w/e) That's it.
12001	Hartman made this type first	19023	It looks like it and there is the H to verify and it doesn't look like a knock off. (w/M) It is sturdy, the clasps are, it is well made. (interviewee only said "Maybe Hartmann")
12002	It looks like the Hartman I was considering		

As seen in the foregoing table not one of the 21 interviewees, who associated the Hartmann hanger bag with Hartmann, referenced even one of the alleged dominant features of the common law trademark for the hanger bag. In some of the above answers the only specific feature identified by the interviewee was "quality" (13002, 10406, 10433, 10546). Quality per se is not the alleged common law trademark. Another interviewee (19023) stated "It looks like it and there is the H to verify and it doesn't look like a knock off." It is not known how many other interviewees were influenced by any uncovered "H". Still another interviewee (12003) stated that "I have a Hartmann wallet and it has some of the qualities like finished leather the sewing & the padding." The record does not show that a Hartmann wallet includes the alleged dominant elements of (a) the flattened version of the figure-8 saddle handle with simulated lock flaps and (b) double buckles on a lower pocket flap.

Rappeport reported that 874 interviewees (those who did not identify a specific brand name or manufacturer) were asked question 4; that of these 874 interviewees, 196, or 16.4 percent of the total 1,198 interviewees answered that they believed that luggage which looked like the piece of Hartmann luggage shown them was manufactured by one company; and that the remaining 677 interviewees or 56.7 percent of the total 1,198 interviewees answered that they believed that luggage which looked like the piece of Hartmann luggage shown them was manufactured by more than one company (one interviewee did not know whether the luggage was produced by one or by more than one company). The responses to question 4 are represented in the following table:

	One Company		More than One Company		Not Known
		percent		percent	
Hanging Bags -	58	14.5	245	61.4	1
Carry On - - -	39	9.5	247	60.2	0
Attache - - -	99	25.4	185	47.6	0
Total - - -	196	16.4	677	56.5	1

(FF 432).

The 677 interviewees who answered that they believed that luggage which looked like the Hartmann piece shown them was manufactured by more than one company were then asked question 4A, viz. "Do you believe that luggage which looked like the piece shown you originally was manufactured by one company and then was copied by other companies or that the luggage was never identified with one company." The responses to question 4A are represented in the following table:

	One Company, Now Copied		Never One Company		Not Known
		percent		percent	
Hanging Bags -	173	43.4	70	17.5	3
Carry On - - -	161	39.3	81	19.8	2
Attache - - -	122	31.4	63	16.2	0
Total - - -	456	38.0	214	17.9	5

(FF 435).

No probing question or a control question, viz. "Why do you say that?", was asked the interviewees who responded to either question 4 or question 4A. Hence there is nothing in the record to show why the interviewee either believed that the Hartmann bag shown him was made by one company or believed that the Hartmann bag was manufactured by more than one company, or believed that the Hartmann bag was originally manufactured by one company and later was copied by other companies.

Rappeport testified that by the probing question 3A, he was trying to sort out as much as he could from those people who were purely guessing. He testified that a probing question of type 3A was not asked after question 4 because guessing is not a meaningful thing with regard to question 4 since question 4 involves a belief. (FF 439). The record however does not establish how an interviewee cannot guess an answer to question 4, viz. "Do you believe that [the bag] which looks like this are manufactured by one company or more than one company?" or to question 4A, viz. "Do you believe that [the bag] which look like this originally was manufactured by one company and then was copied by other companies or that [the bag] which look like this was never identified with one company?" but can guess an answer to question 3, viz. "Which manufacturer or brand name is that?" Dr. Kegan, respondent Starco's expert on market surveys (FF 519), testified that a probing question should be asked after every important question in a survey of the type conducted under Rappeport; that Rappeport put much more reliance on question 4A (in terms of results that support a single source identification) than he did on question 3 and, hence if the interviewer was limited to one probe question the probe question in the survey was in the wrong place. (FF 524).

Based on responses to questions 3, 4 and 4A, Rappeport concluded that four out of five persons interviewed believed that the particular luggage they saw was at least at one time identified with a single source. In support, Rappeport relied on the 7 percent who said Hartmann plus the 20 percent who said some other company, but think there is a single supplier (both in answer to question 3) plus the 16 percent (in answer to question 4) who said it is just one company plus the 39 percent (in answer to question 4A) who said it was originally made by a company and now copied. This was said to give a total of 82 out of 100 or a little more than 4 out of 5. Rappeport stated another way for determining the "four out of five persons" estimate was to count only the 7 percent who said Hartmann, the 16 percent who said one company now makes it and the 39 percent who said it was originally made by a company and now copied (20 percent are eliminated because of uncertainty with respect to how the interviewees felt or because it is believed that they were

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guessing or were induced) which resulted in a total of 62 percent out of 80 percent which was said to be almost four out of five. Rappeport does not agree that there was any guessing. (FF 449).

The administrative law judge finds that the absence of probing questions after questions 4 and 4A seriously affects the reliability of Rappeport's conclusion, especially when the reasons stated by the interviewees in answer to question 3 are examined. Moreover, as Dr. Kegan testified (FF 519) the results that support Rappeports' conclusion are weighted more on questions 4 and 4A than on question 3. Thus Rappeport for his "four out of five persons" conclusion (FF 449) relied on the above 39 percent in answer to question 4A (the highest percentage relied on) and the 16 percent in answer to question 4. No probing question of the question 3A type was used for questions 4 and 4A. Moreover while Rappeport did not agree that the 20 percent who identified a specific company other than Hartmann was guessing, he stated as part of his key findings that "conversely fully a fifth of those naming Samsonite talk only in terms of it being the best known brand and in some cases explicitly say they guessed Samsonite for that reason." (FF 413).[28]

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[28] The administrative law judge in his findings has identified the reasons advanced by interviewees for stating a specific brand other than Hartmann. See (FF 422, 427, 430). An analysis of those reasons shows the same type of deficiencies as exist in the reasons stated by the interviewees for naming "Hartmann".

In addition to the absence of probing questions after questions 4 and 4A, while in question 2 of the survey interviewees were given an explicit option to answer that they could not identify the brand name or manufacturer of the luggage shown them (i.e., did not know the brand name or manufacturer), an explicit option to respond "I don't know" was not included for questions 4 and 4A of the survey. Dr. Kegan, testified that in the absence of an explicit "Don't know" option, interviewees are more likely to guess. (FF 524).

Referring to the Judicial Conference guidelines for a survey, supra, the administrative law judge finds that the foregoing shows that the third and sixth guidelines were not met. Also in view of the errors in transcribing the information and miscoding,[29/] it is questionable whether the fifth guideline was met.

The administrative law judge, based on the foregoing, finds that complainant has not sustained its burden of establishing secondary meaning, through survey evidence, for any of the alleged common law trademarks in issue.

(ii) Other Evidence Alleged to Demonstrate Secondary Meaning

Complainant argued that Hartmann has enjoyed a long period of considerable sales of its products using the alleged common law trademarks in issue and that those products now represent about percent of the total Hartmann business. (CPost at 19-21). Complainant also argued that it has submitted convincing circumstantial evidence of secondary meaning in the form

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[29/] See fn. 18, 26 at 36, 43.

of extensive national advertising for 23 years of its attaches and 13 years of its hanger bags and carry-on bags which focus on the products involved in this investigation. (CPost at 21-26).

The attache with the alleged trademark was introduced by Hartmann in 1963 (FF 40). In the early seventies Hartmann introduced the hanger bag and carry-on bag with the alleged trademarks. (FF 58, 109). It was not until the fall of 1983 that Hartmann introduced the soft pullman said by complainant to have substantially the same "overall appearance" as Hartmann's attache. (FF 119).

Hartmann has introduced evidence showing the extent of sales and advertising of Hartmann products, including the products in issue. (FF 128). In considering evidence of this nature with respect to secondary meaning the question is not the extent of promotional efforts but the effectiveness of the efforts in determining their impact upon the acquisition of secondary meaning by the alleged trademarks, i.e. impact on purchasers such that they rely on the alleged trademarks as an indication of origin of the product. See Aloe Creme Laboratories, Inc. v. Milsan, Inc., 165 U.S.P.Q. 37, 41 (5th Cir. 1970). There must be evidence that the advertising was effective in creating consumer perception of the overall appearances as trademarks. Major Pool Equipment Corp. v. Ideal Pool Corp., 203 U.S.P.Q. 577, 584 (N. Ga. 1979). Thus complainant must show the acquisition of secondary meaning by the alleged trademarks separate and independent from secondary meaning attributable to any word marks or functional attributes that appear in the promotional efforts. See In re Johnson & Johnson, 129 U.S.P.Q. 371, 372 (T.T.A.B. 1961) where it was held that there was nothing in the record to indicate that applicant for a trademark had promoted or advertised its particular alleged trademark separate and apart from a word mark; In re Morgen David Wine Corp., 152 U.S.P.Q. 539, 595 (C.C.P.A. 1967) where the court stated that "there is nothing to indicate that the container has been promoted separate and apart from the word mark 'MORGEN DAVID'"; and Petersen Mfg. Co. Inc. v. Central Purchasing, Inc., 740 F. 2d 1541, 222 U.S.P.Q. 562, 569 (Fed. Cir. 1984) where the court stated that there was no evidence from consumers "that they rely on shape alone, rather than on the prominently displayed word mark VISE-GRIP, to identify the source of the product."

Earlier in the opinion, pp 23-26, reference is made to the functional aspect of complainant's advertising. Moreover the advertising is replete with the Hartmann logo, the Hartmann trademarked slogan "We don't cut corners" and the Hartmann name. See p. 26.

Complainant argued that the actions by Hartmann over 23 years in maintaining the "same overall appearance" for its products in issue stand as good circumstantial evidence that the look of the products was recognized by consumers as Hartmann clearly believed. (CPost at 30-31). Hartmann's belief however is not controlling. See Plastilite Corp. v. Kassnar Imports, 508 F. 2d 824, 184 U.S.P.Q. 348 (C.C.P.A. 1975); Roux Laboratories, Inc. v. Clairol Inc., 424 F. 2d 823, 166 U.S.P.Q. 34, 39 (C.C.P.A. 1970). Moreover there has not been a "same overall appearance" in the products in issue. Complainant admittedly alleged the existence of three different common law trademarks in the products in issue. See CPFF 7, CPFF 14, CPFF 20. Also while there has been a sameness in certain elements of the overall appearances of the

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particular bags in issue, the overall appearances through the years, even in particular bags in issue, have varied. For example, complainant has alleged that the overall appearance of the hanger bag was developed in about 1971 (CPFF 10). The following features in the overall appearance of the 1971 hanger bag were said to be changed in subsequent versions: a tapered gusset at the side of the bag and a diagonal zipper on the back of the bag. (FF 175). In late 1978 or early 1979 complainant changed the overall appearance of the hanger bag by widening the gusset to a three inch gusset. It was also said that there was a splitting of the single pocket (with a single flap over the lock and single buckle) on the front of the bag into double pockets with dual flaps over the locks and dual buckles. (FF 110). Also a top pocket was added to the front of the bag. In 1982/83 the top pocket of the hanger bag was changed to allow zipper access at the side or top of the pocket. (FF 176).

With respect to the carry-on bag, complainant has alleged that the overall appearance was developed in 1973 (CPFF 16). In 1979 Hartmann introduced the C3 carry-on bag. The overall appearance of this bag was different from the bag introduced in 1973 in that it had three zipper compartments whereas the earlier bag was a one compartment bag. (FF 112).

Even with the Hartmann attaches in issue the overall appearances are not identical. For example the Hartmann attache CPX-4 has no visible combination lock and even no visible lock. The Hartmann attaches CPX-2, CPX-3 and CPX-5 have visible combination locks under the saddle handle. Hartmann attache CPX-2, CPX-3 and CPX-4 have patches on the side with the Hartmann name.

Hartmann attache CPX-5, although having the Hartmann name on the side, does not have it on a patch. The Hartmann attache CPX-5 has an embossed "h" on a patch on the top panel. The Hartmann attaches CPX-2, CPX-3 and CPX-4 have an embossed "h" directly on the top panel (no patch). In addition colors and materials of the particular Hartmann bags in issue vary.

Complainant argued that Mr. Katz, the former president of Hartmann, testified that the distinctive features of the Hartmann attache in issue were recognized by customers; that Ms. Penix, vice-president of Hartmann, testified that judging from correspondence and conversations that she had on the telephone with customers under her customer service responsibility, customers recognized the Hartmann look and overall appearance of its particular products; and that Michael Davis, Starco's expert on luggage at the hearing, testified that consumers in general would identify the Hartmann attaches. (CPost at 31, 32). Mr. Katz and Ms. Penix are obviously interested parties and hence their testimony is not controlling. *See In re David Crystal, Inc.*, 132 U.S.P.Q. 1, 2 (C.C.P.A. 1961). *Plastilite Corp. v. Kassnar Imports*, 508 F. 2d at 824, 184 U.S.P.Q. at 350. Moreover in the testimony of Ms. Penix (Tr. 90-91) relied upon by complainant, no details were presented with respect to the correspondence and the conversations Ms. Penix had. When Ms. Penix was asked at the hearing whether the customers ever described the Hartmann look other than to talk about a prestigious Hartmann case, she testified "not per se, to say, this is the Hartmann look; no." (Tr. at 91).

Mr. Michael Davis did testify that consumers in general would recognize a Hartmann. (FF 311). However, he also testified that the external features of the Hartmann attache are all functional with the exception of the hang tag and the Hartmann name and logo. (FF 292).30/

Complainant argued that Monarch, Montgomery Ward, Kingport and Dimensions, certain respondents identified in the notice of investigation, had entered into Consent Order Agreements with the complainant and that other companies have agreed to stop selling certain products. (CPost at 32-33). Third party agreements have little or no probative value with regard to complainant's claim of secondary meaning. At best such agreements indicate that complainant's competitors found it more advantageous to enter an agreement than to run the risk of litigation. *See* *In re The Wella Corporation*, 565 F. 2dd 143, 196 U.S.P.Q. 7, 8 (C.C.P.A. 1977), *In re Frederick Warne & Co., Inc.* 218 U.S.P.Q. 345, 348 (T.T.A.B. 1983).

Complainant argued that direct customer correspondence showed secondary meaning (CPost at 33-34). Thus it stated that in November 1985, Hartmann received a copy of an H3 hanger bag returned by a Mr. after the bag had been severely damaged. (CPFF 120). However Hartmann's Ms. Fenix testified at the hearing that when the bag was received by Mr. as a gift, it had a Hartmann tag on it which led Mr. to believe the bag was a Hartmann bag. She also testified that when the bag was received by

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30/ Michael Davis concerned himself only with the Hartmann attache since the only alleged common law trademark Starco is accused of infringing is the mark for the Hartmann attache.

Hartmann it had a Hartmann tag on it. (FF 137). Complainant also relies on the witness statement of Norma Pelletier, divisional supervisor of Hartmann's Customer Services Department and a letter and hanger bag sent by a Mr. to Hartmann relating to what she assumed from the letter to be a Hartmann bag purchased from Fortunoff's in Long Island but which bag on inspection was not a Hartmann bag. (CPFF 119). Ms. Pelletier gave no live testimony and was not subject to cross examination and neither Mr. nor a representative of Fortunoff's testified. Hence the record is unclear as to why the bag was returned to Hartmann. As Ms. Pelletier's February 12, 1986 return letter to Mr. stated (CX-140), the bag may have been returned because it was marketed by Fortunoff's as a Hartmann hanger bag. Finally complainant relies on an affidavit of Tammy Rodgers, a Hartmann supervisor in Customer relations, and a note of a employed by the luggage department of American airlines to demonstrate an instance where a person believed that a copy of a Hartmann product was a Hartmann product and returned it for repair. (CPFF 118). Rodgers gave no live testimony and was not subject to cross examination and did not testify. Hence the record is unclear as to why believed the product was an "alleged w-26." Moreover Rodgers in his affidavit stated that while the suitcase appears to be "a very good copy of a Hartmann International Series pullman suitcase which would be likely to confuse customers", he was able to determine that the suitcase, on a description and inspection of photographs, was not a Hartmann case from the following differences in the overall appearance of the case: the locks on the suitcase were longer than the locks normally on Hartmann suitcases, the Hartmann name was not on the suitcase, it had a different thread for the binding and the handle was riveted to the case, not attached by a screw, and "was also further away from the handle than Hartmann does it" and the locks on the case were not the Hartmann Presto locks. (CX-99).

Complainant argued that the substantial similarity in appearance of respondents' products, where other designs could have been used, speaks for itself and is probably sufficient evidence that the respondents in fact engaged in studied and deliberate copying; that there is direct evidence of copying in that respondent Starco has a Hartmann A4 attache which it had torn apart and thereafter had duplicated so closely that it even copied the name plate used to put the Hartmann name on the case;

that the respondents' Starco/K mart attache copies a tweed fabric used by Hartmann for 20 years and recognized as a Hartmann fabric; that respondent Dimensions touted its copies of the Hartmann hanger bag and the Hartmann carry-on bag in widely distributed catalogs as "look-alikes" and "duplicates;" that respondent Montgomery Ward had sold hanger bags and carry-on bags which so carefully copied the trade dress of the Hartmann products as to duplicate patches for the "h" logo found on the Hartmann hanger bag and carry-on bag; and that respondent American

Guard-It admitted that its hanger bags and carry-on bags "look exactly like" the Hartmann products and stated that they knew it and "everyone did, too." (CPost at 26, 27). It is argued that the Commission in Novelty Glasses, 208 U.S.P.Q. 380 and Fuses, 221 U.S.P.Q. 792, held that deliberate copying raised a rebuttable presumption of secondary meaning and that no respondent nor the staff has submitted any evidence to rebut the presumption. (CPost at 28, 29).

Respondent Starco argued that the lock flap and handle structures used on the Hartmann attaches in issue are the subject of an expired U.S. utility patent no. 3,161,271 and that the configuration of the Hartmann attaches in issue is also the subject of two expired U.S. design patents: nos. 198,661 and 198,662. (RPost at 3).

In Vacuum Bottles, the Commission stated that, in Novelty Glasses, it found that a presumption of secondary meaning is raised only by a deliberate and close imitation of the senior user's distinctive trademark; that "the glasses at issue [in Novelty Glasses] could have been considered almost inherently distinctive or semi-fanciful;" and that in the cases cited by the complainant in Vacuum Bottles for the proposition that deliberate copying shows secondary meaning, the marks involved were strong marks for which little, if any, secondary meaning had to be shown. Id 219 U.S.P.Q. at 645, 646.

In Fuses the Commission stated that an unlawful copying occurs where, inter alia, one party copies the non-functional features of a product of another. 221 U.S.P.Q. at 802. Also the record in Fuses contained evidence that there were instances where respondents used the letter trademarks of complainant and of complainant's sole licensee, that there was an instance where a respondent had used a picture of a blade fuse of complainant in advertising the respondent's products and that there were instances where respondents passed off their imported fuses as complainant's fuses. Id at 804.

In this investigation the administrative law judge has found that the alleged common law trademarks in issue are not inherently distinctive, and that survey evidence has not established secondary meaning. Moreover, a functional aspect (the lock strap) of the alleged common law trademark in issue for the Hartmann attache is claimed in an expired utility patent (FF 296, 297). Starco representatives were under the belief that there were no patent problems with the Starco attache because any patents on the attache had expired and the construction of the Starco attache was different. (FF 320, 340). Complainant's president Katz testified that said utility patent showed an attache which has the Hartmann look. (FF 126). Also certain aspects of the alleged common law trademarks are shown in two expired design patents (the lock strap and the figure eight handle). (FF 298, 299). In addition the copying has included the copying of functional features. While complainant argued that the Starco/K mart attache copies a tweed fabric used by Hartmann for 20 years, the alleged common law trademark in issue for the attache is not synonymous with a tweed fabric. Moreover the administrative law judge can find nothing in the record to establish that there have been instances where the respondents have used Hartmann's logo in their advertisements. To the contrary, respondents' advertisments have referenced their own trade symbols. (FF 366).[31] In Fuses, passing off was found, i.e. specific proof of an intent to deceive, independent of any trademark infringement. 221 U.S.P.Q. at 803.[32] The record in this investigation does not establish an intent to deceive.

It is reasonable to infer that there has been copying of at least some features of complainant's alleged common law trademarks. However a finding of copying alone is not sufficient evidence from which to conclude that secondary meaning has been acquired, for such an analysis requires that all pertinent factors be viewed in context. Artus Corp. v. Nordic Co., Inc., 213 U.S.P.Q. 568, 572 (W.D. Pa. 1981). Accordingly the cumulative effect of this examination, based upon the record evidence, guides the administrative law judge.

For the foregoing reasons, the administrative law judge finds that complainant has not established a factual foundation, through a preponderance of the evidence, from which an inference may be drawn that each of the alleged common law trademarks has acquired secondary meaning.

Primarily Functional or Nonfunctional

In determining whether an alleged common law trademark is primarily functional or nonfunctional, the Commission has adopted the test of In re Morton-Norwich Products, Inc., 671 F. 2d 1332, 213 U.S.P.Q. 9 (C.C.P.A. 1982)

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[31] A third party has used the phrase "We Don't Cut Corners." (FF 365).

[32] In Fuses, the Commission found that passing off, in addition to proof of the elements of trademark infringement, requires proof of an intent to deceive. 221 U.S.P.Q. at 805.

(Morton-Norwich). See Vacuum Bottles, 219 U.S.P.Q. at 647-649 and Cube Puzzles, 219 U.S.P.Q. at 330,331.

In the Morton-Norwich case, the court reversed the Patent Office Trademark Trial and Appeal Board's holding that appellant's design for a spray top container was functional and for that reason can never be registrable. The court distinguished between de facto functional and de jure functional. De facto functional does not prevent a configuration from being protected as a trademark. De jure functional prevents a configuration from ever becoming a trademark.

In Morton-Norwich a number of factors, both positive and negative, were said to exist which aid in determining whether a configuration is de jure or de facto functional. Thus the existence of an expired utility patent which disclosed the utilitarian advantage of the configuration sought to be found, as a trademark, was evidence that the configuration was de jure functional. It was said that it also may be significant in finding a configuration de jure functional that the originator of the configuration touts its utilitarian advantage through advertising and that it is significant for a finding of de facto functional that there are other alternatives available.[33/] Finally it was said that it is significant for finding a configuration de jure functional

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33/ The court in Morton-Norwich in finding that a spray top container was not de jure functional, noted that the evidence consisting of competitor's molded plastic bottles for similar products demonstrated that the same functions can be performed by a variety of other shapes with no sacrifice of any functional advantage, that there was no necessity to copy appellant's trademark to enjoy any of the functions of a spray top container, and that the spray top can take a number of diverse forms equally suitable as housings for the pump and spray mechanism. Id. at 1342, 213 U.S.P.Q. at 16.

that a particular configuration results from a comparatively simple or cheap method of manufacturing the article.[34] The court concluded that de jure functional is dependent on whether the configuration is the best configuration or at least one of a few superior configurations available. If the configuration is not, it is not de jure functional.[35]

Based on the test of Morton-Norwich the administrative law judge finds that the Hartmann alleged common law trademarks are nonfunctional. Commercially available alternatives to the particular Hartmann configurations exist. (FF 258, 259, 260, 261, 341, 343, 344, 356, 358). The expired utility patent does not claim an overall appearance. (FF 296, 297, 346). Certain of complainant's operations which produce the products in issue are hand operations (FF 71, 85, 90, 91, 92, 101, 355, 673) which is generally less than a cheap operation.[36]

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[34] The court in Morton-Norwich found that competitors have apparently had no need to simulate appellant's trade dress to enjoy all of the functional aspects of a spray top container; that because the functions of appellant's bottle can be performed equally well by containers of innumerable designs, no one is injured in competition; and that upon expiration of any patent protection appellant may be enjoying on its spray and pump mechanism, competitors may even copy and enjoy all of its functions without copying the external appearance of appellant's spray top. Id. at 1342, 17.

[35] The court in Morton-Norwich, while concluding that the configuration must be accommodated to the functions performed, saw no evidence that the configuration was dictated by them and thus resulted in a functionally or economically superior design. Id.

[36] The administrative law judge does not consider his holding that the alleged common law trademarks are primarily nonfunctional to be inconsistent with his conclusion that the alleged common law trademarks are not inherently distinctive. As the Commission stated in Cube Puzzles, 219 U.S.P.Q. at 327 referring to Morton-Norwich, functionality must be determined in light of the competitive necessity to copy with the number of alternatives being an important factor in making this determination. The question of whether a mark is inherently distinctive involves a different question, viz. whether the sole purpose of the mark is to act as a trademark. The sole purpose of the alleged trademarks in issue is not to act as trademark. See pp. 23-26.

Based on the foregoing the administrative law judge finds that each of the alleged common law trademarks is primarily nonfunctional.

Generic or Nongeneric

The Second Circuit, in Abercrombie & Fitch Co. v. Hunting World, Inc., 189 U.S.P.Q. 759, 764 (2nd Cir. 1976), stated that a generic term is one that refers, or has come to be understood as referring, to the genus of which the particular product is a species. It noted that at common law neither those terms which were generic nor those terms which were merely descriptive could become valid trademarks but that the Lanham Act in section 2(f), 15 U.S.C. § 105(2)(f) made an important exception with respect to those merely descriptive terms which have acquired secondary meaning. However it noted that the Lanham Act offered no such exception for generic marks. Thus a generic mark can never function as a trademark to indicate origin. See McCarthy, supra, § 12.1. The Commission has determined that the overall appearance of a product is capable of becoming a common law trademark provided there is evidence that the product has achieved secondary meaning. See Vacuum Bottles, 219 U.S.P.Q. at 647, Milling Machines, 223 U.S.P.Q. at 337. Accordingly, the administrative law judge finds that the overall appearances of complainant's products in issue are not incapable of becoming common law trademarks, assuming there is evidence that establishes secondary meaning.

III. The Strength of the Alleged Common Law Trademarks

Complainant argued that the evidence submitted on distinctiveness conclusively shows that the alleged trademarks for its attaches, hanger bags and carry-on bags are at least strong marks in terms of evaluating the secondary meaning evidence. (CPost at 16-19). The staff argued that complainant's alleged common law trademarks are relatively weak and, therefore, require significant evidence of secondary meaning, citing McCarthy. supra, §§ 11:24, 15:11. (SPostR at 6-10).

The administrative law judge finds that the alleged common law trademarks are of a weak nature based on the divergent testimony of complainant's witnesses as to what the alleged common law trademarks are, see pp. 4-14. In addition the weak nature is shown by the inherent potential of each of the marks at the time of first use, see pp. 23-26, and actual customer recognition of the alleged marks at the time the marks were asserted in this investigation. See supra at 27-53 [37]

IV. Infringement of the Alleged Common Law Trademarks

In determining whether a common law trademark is infringed, the Commission has assessed whether there is a likelihood of confusion of an appreciable number of reasonable buyers faced with similar marks. Vertical Milling Machines, 223 U.S.P.Q. at 343. However if a senior user has not obtained secondary meaning in a non-inherently distinctive mark, then another's use of a similar mark cannot result in buyer confusion for buyers do not associate the mark only with the single source. Putting it another way, if a buyer does not recognize the mark and does not associate it with a single source, there can be no confusion when faced with two or more sources who use similar symbols on their products. Thus to find that there is no secondary meaning in a non-inherently distinctive mark and then to find that there is likelihood of confusion is a non-sequitur.[38/] Courts have followed this approach.[39/] In past investigations however the Commission, although finding that there is no common law trademark in a complainant's product because of the absence of secondary meaning, has assumed arguendo that such a trademark exists and addressed the issue of infringement. Milling Machines, 223 U.S.P.Q. at 343.

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[37] This test has been termed the "two-prong test." McCarthy supra § 11.25.

38/ McCarthy, supra § 5.3.

39/ In American Luggage Works, Inc. v. U.S. Trunk Co., 158 F. Supp. at 52, Judge Wyzanski found that it was unnecessary for the district court to decide whether a plaintiff had borne its burden of proving that ultimate consumers are likely to be confused by the similarity of plaintiff's and defendant's bags because there was no evidence that plaintiff met its burden in establishing that plaintiff's design had in the ultimate consumers' market an established connotation. In Textron, 224 U.S.P.Q. at 631, the Federal Circuit found that Textron had not demonstrated its entitlement to a common law trademark for all or any part of the design of its Bridgeport Series I machine and hence because no trademark existed in the design, it found no need to reach the issue of whether Textron's alleged trademark had been infringed, based on the likelihood of confusion as to source or sponsorship between the complainant's and respondents' machines.

Federal courts following New York law have considered likelihood of confusion in the absence of a finding of secondary meaning. In Flexitized, Inc. v. National Flexitized Corp., 142 U.S.P.Q. 334, 339 (2nd Cir. 1964), the court did find that the evidence adduced in the district court amply supported a finding that as the law of unfair competition had developed in New York, defendants' continued use of the word "Flexitized" after they had ceased to distribute plaintiffs' product made plaintiffs the victim of unfair competition notwithstanding the fact that plaintiffs' mark had not yet acquired a secondary meaning. It was said that in New York a particularly developed doctrine is that of granting relief upon the theory of the misappropriation of a property right or a commercial advantage of another. In Perfect Fit Industries, Inc. v. Acme Quilting Co., Inc., 205 U.S.P.Q. 297, 300, 301 (2nd Cir. 1980) the court concluded that, under New York law, complainant was not required to prove secondary meaning in order to obtain relief from Acme's infringing trade dress. However, while relying on New York law, the court stated that the district court had found that complainant's trade dress "was distinctive and memorable."

At issue in this investigation is whether there is a likelihood of confusion with complainant's alleged common law trademarks and the marks on respondents' Starco and K mart attaches, the marks on respondents' Pei Lin and American Guard-It hanger bags and carry-on bags, and the marks on settling respondents' Dimensions, Kingport, Monarch, and Pedro hanger bags and carry-on bags.[40]

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[40] With respect to including bags of four of the eight settling respondents: in *Certain Rotary Wheel Printers*, Inv. No. 337-TA-185 (1985), the Commission noted that "[o]n two recent occasions the Commission has expressly stated that there must be a finding of an unfair act with respect to the imports of settled respondents in order to consider the impact of those imports in assessing injury". *Rotary Wheels* at 44, citing, *Certain Foam Earplugs*, Inv. No. 337-TA-184, Notice of Commission Decision not to Review Initial Determination, 50 Fed. Reg. 4277 (1985); *Certain Bag Closure Clips*, Inv. No. 337-TA-170, Notice of Commission Decision not to Review Initial Determination. 49 Fed. Reg. 35872 (1984). The Commission however held that consideration of imports of the settling respondents was not appropriate in *Rotary Wheels* because there was no finding that an unfair act was committed by any of the settling respondents. In *Certain Trolley Wheel Assemblies*, Inv. No. 337-TA-161 (1984) the administrative law judge determined not to consider the imports of a settled respondent in his injury analysis on the premise that such inclusion would be inconsistent with the Consent Order Agreement entered into by the complainant, respondent and Commission investigative attorney. The Commission overruled the judge on this point, disagreeing with his interpretation of Commission precedent and held that the imports of a settled respondent are not relevant in every instance, but were relevant to the injury analysis in *Trolley Wheels* because virtually all of the the infringing imports came from the settled respondent and that the settlement agreement did not bind the original source of the infringing articles. *Trolley Wheels*, Views of the Commission at 8-11. Thus imports of a settled respondent are relevant to injury (and a determination of whether the imports involve an unfair act should be made) when the original source of the accused products is not bound by any settlement agreement or consent agreement. *Certain Foam Earplugs*.

In the instant investigation respondent foreign supplier Pungkook has settled. Also Montgomery Ward and its foreign supplier, Hiraoka have settled. *See* Order Nos. 58 and 62. Accordingly, only Pungkook and Montgomery Ward's imports should be exempted from the injury analysis. The other settling respondents' foreign suppliers are not bound by the settlement agreements or consent orders. Imports

are therefore relevant to the injury analysis if it is found that their imports involved unfair acts. (FF 735, 739-741).

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The Commission has held the following factors pertinent in determining likelihood of confusion: (a) the degree of similarity between complainant's trademark and respondents' products; (b) the intent of the respondents in adopting their designs; (c) the relationship in use and manner of marketing between the goods of the two parties; and (d) the degree of care likely to be exercised by purchasers. Certain Coin Operated Audio Visual Games and Components Thereof, 214 U.S.P.Q. 217 (1981) (Games I); Milling Machines, 223 U.S.P.Q. at 332; Cube Puzzles, 219 U.S.P.Q. at 232, Staple Gun Tackers, 6 ITRD at 1646.

Complainant relying on factors, including the above, argues that there is a clear likelihood of confusion from respondents' products being sold with the "same overall appearance as Complainant's common law trademarks." (CPost at 61-71). The staff contends that secondary meaning has not been shown and therefore no trademark rights exist in the overall appearances of complainant's luggage. However assuming arguendo complainant established secondary meaning, the staff relying on the above factors, believes the evidence would demonstrate a likelihood of confusion. (SPost at 39-43).

The administrative law judge has found that buyers do not recognize and associate the alleged common law trademarks with a single source. However if it is assumed that buyers do recognize the alleged trademarks and associate said trademarks with a single source, the administrative law judge finds that there is a likelihood of confusion based primarily on similarities in the appearances of the products in issue, statements of respondents that products which they have sold are "look-alikes" of Hartmann products, and the relationship in use and manner of marketing between the goods of complainant and of the respondents.

Similarity is shown in a visual comparison of Hartmann attache's CPX-2, CPX-3, CPX-4, CPX-5 with respondents' Starco-K mart's CPX-18, CPX-27, CPX-31, CPX-32, CPX-44; Hartmann hanger bag's CPX-6, CPX-7 with respondents' Kingport-Dimensions CPX-35 hanger bag and American Guard It's CPX-21 and CPX-40 hanger bag; Hartmann carry-on bags CPX-8, CPX-9, CPX-30 with respondents' Kingport-Dimensions CPX-28 and American Guard It's CPX-23. Similarity is also shown in a visual comparison of Hartmann's hanger bags CPX-6, CPX-7 and its carry-on bags CPX-8, CPX-9 and CPX-30 with respondent Pei Lin's corresponding bags in CX-49.

(FF 361). Also retail outlets that have carried Hartmann luggage have also carried respondents' luggage and retail stores generally do not leave hang tags exposed. (FF 362, 723, 726-28, 742-44). The evidence further demonstrates that respondents have advertised in the same media and attended many of the same trade shows as complainant. (FF 304).[41]

For the foregoing reasons, if it is assumed that the alleged common law trademarks have a secondary meaning, the administrative law judge finds that complainant has sustained its burden in establishing a likelihood of confusion.

V. Trademark Dilution

Complainant argued that the answers to question 4A in the survey show that the copies by the respondents have diluted the identification of Hartmann's trademarks. (CPFF-280).

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[41] The evidence demonstrates that the Hartmann bags in issue have a higher quality in comparison with respondents' bags. See FF 185, 207-209, 211-214, 218-234. Hence if quality is assumed to relate in some way to the alleged common law trademarks, quality would teach away from any likelihood of confusion. There has been survey evidence submitted in connection with the issue of likelihood of confusion. See FF 547-578. The evidence is inconclusive as to whether the common law trademarks are the source of the confusion since no probing questions were used in the confusion portion of the survey. (FF 534). Respondent Starco's expert Kegan testified that telling somebody that a bag is Hartmann which is a word mark in the middle of the survey, before one asks the person some key questions fatally flaws the survey. (FF 522). He also testified that the confusion evidence of the Rappeport survey related to confusion in the marketplace, not to confusion caused by a respondent's false designation of origin. (FF 579). Moreover Rappeport testified that the survey did not address the question of whether there is confusion as to source of origin in the minds of the consumers. (FF 580). In addition the reported survey results on confusion were not free from errors. (FF 558, 561, 564, 567). Also respondents' advertisments and products have referenced their own trade symbols. (FF 152, 240, 241, 366). Both the Commission and the Federal Circuit have held that labeling of a product with the name of the source is strong evidence of no confusion. Milling Machines 223 U.S.P.Q. at 344; Litton Systems, Inc. v. Whirlpool Corp. 728 F.2d 1423, 221 U.S.P.Q. 97 (Fed. Cir. 1984).

There is a general requirement that a trademark be strong and distinctive for trademark dilution. McCarthy supra, § 24:14. The administrative law judge has found the alleged trademarks in issue weak. See pp 66-67. Moreover, as to survey question 4A, the evidence is inconclusive as to whether the common law trademarks are the source of the confusion. See fn. 41.

The administrative law judge finds that complainant has not sustained its burden of proof in establishing trademark dilution by any of the respondents.

VI. Passing Off

Commission precedent establishes that the essential element in establishing the unfair act of passing off is that of "an intentional act of deception, beyond mere copying, with the purpose of confusing the public into believing one's product is that of another." Metal Cutting Snips, USITC Pub. 1836 at 93-94; Cube Puzzles, 219 U.S.P.Q. at 333-34; Staple Gun Tackers, 6 ITRD at 58; Vacuum Bottles, 219 U.S.P.Q. at 64.

Complainant argued that in November or December 1985, Andrea Harkins, Territory Manager for Hartmann, saw a sales person in a Mass Bros. store in Florida represent that "Club Class" copies of the Hartmann hanger bag and carry-on bag were "a cheaper version of Hartmann;" and that after she had witnessed this instance of passing off, she was told that the sales personnel were told "to do this" for the copies in the store. (CPFF 277). There was no live testimony from Ms. Harkins. In addition the record lacks any identification of the person or entity who "told [Ms. Harkins] that the sales personnel were told to do this for the copies in the store". Moreover the

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witness statement of Ms Harkins, relied on by complainant, merely states that based upon what the sales person was saying, Ms. Harkins got the impression that the Club Class copies were being referred to as a lower priced version of Hartmann. (CX-141). Finally the record is inconclusive as to whether the "Club Class" copies were imports. The administrative law judge finds that Ms. Harkins' witness statement does not prove deception by any of the respondents.

Complainant also argued that respondent Starco had made such studied copies of the Hartmann products as to imitate patches on the product put there for no reason except to identify the Hartmann name. (CPFF 278). The patches referred to are blank patches (See CPX-12). Thus the patches do not carry any Hartmann logo. The "base imitation of another's product, without more, is permissible" American Safety Table Company v. Schreiber, 269 F.2d 255, 271-72 (2nd Cir. 1959), cert denied 361 U.S 915 (1959).

The administrative law judge finds that complainant has not sustained its burden of proof in establishing passing off by any of the respondents.[42/]

[42/] While complainant in its complaint alleged trade dress misappropriation, false representation, and unfair competition, complainant has offered no independent proof for any of these allegations. Complainant's post hearing submissions do not even refer to those allegations. In view of the finding of the administrative law judge that the alleged common law trademarks in issue have no secondary meaning, he finds that complainant has not sustained its burden of proof in establishing trade dress misappropriation, false representation and unfair competition by any of the respondents.

VII. Importation and Sale

To invoke the subject matter jurisdiction of the Commission and to support a finding that a violation of section 337 exists, complainant must establish that the accused products have been imported and/or sold in the United States.

accused of importing soft pullmans, soft pullmans will not be considered in the injury analysis. (FF 631)[43]

Based on the above, the administrative law judge finds that accused attaches, carry-on bags and hanger bags have been imported into and sold in the United States.

VIII. Domestic Industry

In section 337 investigations when trademark infringement is alleged as the unfair act, the Commission has defined the domestic industry as that portion of the complainant's facilities devoted to the exploitation of the trademark rights at issue. Certain Plastic Food Storage Containers, Inv. No. 337-TA-152 (unreviewed initial determination) (1984) (Food Storage Containers); Staple Gun Tackers, 6 ITRD 1623; Certain Coin-Operated Audiovisual Games and Components Thereof (Viz. Rally-X and Pac Man), 216 U.S.P.Q. 1106 (1982) (Games II); Vacuum Bottles, 219 U.S.P.Q. at 637 (1982); Certain Coin-Operated Audiovisual Games and Components Thereof, 214 U.S.P.Q. 217 (1980) (Games I); Certain Airtight Cast Iron Stoves, 215 U.S.P.Q. 963 (1980). The Commission does not adhere to any rigid formula in determining the scope of the domestic industry, as it is not precisely defined in the statute, but will examine each case in light of the realities of the marketplace. Certain Slide Fastener Stringers and Machines and Components Thereof, 216 U.S.P.Q. 907 (1981) (Slide Fastener Stringers); see H.R.

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[43] The remaining two respondents, Winn and Weltyle entered settlement agreements with complainant. No evidence has been found showing that Winn or Weltyle has imported or sold the accused products. (FF 632, 633).

Rep. No. 93-571, 93 Cong., 1st Sess. 78 (1973); Certain Apparatus for the Continuous Production of Copper Rod, 206 U.S.P.Q. 138 (1979) (Copper Rods); see, Certain Double-Sided Floppy Disk Drives, 229 U.S.P.Q. 968 (Floppy Disks II) (1985).

The intellectual property rights at issue in this investigation are three separate common law trademarks on three luggage products manufactured by Hartmann, viz. attaches, hanger bags and carry-on bags. (CPost at 1, 2). Complainant's assertion of three common law trademarks raises the question of whether it is appropriate to find a single domestic industry, which encompasses all of the trademark rights in issue, or three narrowly defined domestic industries.

The facts in this investigation support a finding of one domestic industry. Hartmann's design, assembly and sales activities with respect to the luggage products in issue are carried out in its facilities in Lebanon and Smithville, Tennessee. (FF 639). Complainant's manufacturing, marketing and sales operations are generally inter-changable with respect to the individual products at issue. Thus raw materials are purchased in bulk for all of Hartmann's products. There are basically five fabrications used for the products in issue and Hartmann's advertising expenditures are not broken out by product. (FF 639(a-b), 655, 670). In addition, each of the products carries either one or both of two federally registered trademarks, i.e. the name "Hartmann" and the Hartmann "h" which appears on the upper corner on the top side on all of Hartmann's products. (FF 643). (The "h" is embossed in the center of a small leather patch sewn onto fabric luggage or embossed

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directly onto the leather pieces). (CPX-5, CPX-2).[44/]

In Certain Products with Gremlin Characters, Inv. No. 337-TA-201 USITC Pub. 1815 (1986) (Gremlins), the Commission focused on "the nature and significance of complainant's activities relating to the production of the patented, trademarked or copyrighted items in the United States" in making its determination of the scope of the domestic industry. Id. at 8. Thus, although the three trademarks asserted by complainant in this investigation are independent of each other and connected to separate products, the realities of the manufacturing, marketing and sales operations associated with those products dictate a finding of one domestic industry. (FF 636-74). See, Copper Rods, 206 U.S.P.Q. at 161.

The administrative law judge finds that there exists a single domestic industry comprised of complainant's facilities devoted to the exploitation of

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[44/] See. Certain Woodworking Machines, Inv. No. 337-TA-174 (1985), where a majority of the Commission held that "when several industries can be defined on the basis of the exploitation of various intellectual property rights and there is considerable overlap with respect to the products associated with the industries defined in terms of these intellectual property rights, it may be appropriate to define the industry in terms of the commonly shared property right that extends to a grouping of the products." Comm. Op. at 40.

In Food Storage Containers, 337-TA-152, the administrative law judge found one domestic industry where four federally registered trademarks were in issue viz. TUPPERWARE, WONDERLIER, HANDOLIER and CLASSIC SHEER. Complainant's products in that investigation each carried the TUPPERWARE mark; however, the products affected by the unfair acts were complainant's WONDERLIER bowl set, HANDOLIER beverage server and CLASSIC SHEER canister set. The administrative law judge found a single domestic industry consisting of the complainant's domestic operations devoted to the design manufacture and distribution of the three product lines under the TUPPERWARE trademark. Initial determination at 76.

the three common law trademarks covering Hartmann's A4-A9 attache cases, carry-on bags and hanger bags. 45/

IX. Efficient and Economic Operation

A complainant must establish that the domestic industry is efficiently and economically operated in order to prevail under section 337. The Commission has traditionally considered factors such as the use of modern equipment and manufacturing facilities; investment in research and development; profitability; substantial expenditures in advertising, promotion, and development of consumer goodwill; and effective quality control programs to assess whether a domestic industry is efficiently and economically operated. See e.g., Food Storage Containers, 337-TA-152; Staple Guns Tackers 6 ITRD 1623; Games II, 216 U.S.P.Q. 1106; Slide Fastener Stringers, 216 U.S.P.Q. 907.

Hartmann has its headquarters at Hartmann Drive, Lebanon, Tennessee. Hartmann manufactures the luggage in issue at its facilities in Lebanon and Smithville, Tennessee. (FF 639). All of Hartmann's design, assembly and sales activities with respect to the luggage products in issue are carried out

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45/ Belting leather is the only foreign raw material used in the products involved in this investigation. The foreign belting leather represents about percent of the value added to the A4 and A9 attache cases, about percent for carry-on bags, and about percent for hanger bags. For all luggage products made of belting leather, the belting leather would represent over percent of raw material costs. For luggage products using primarily tweed, vinyl, or other materials, the foreign value added would be significantly less, since such luggage would use less belting leather. For all luggage products, belting leather represents about percent of all raw materials purchased by Hartmann. (FF 641-42).

in these two facilities. (FF 639, 639(a)). Hartmann has facilities of approximately . square feet. Of these facilities, square feet are leased. Some square feet are used for manufacturing, square feet are used for storage of finished goods, square feet are used for storage of raw materials, square feet are used for general storage, and square feet are used for offices. (FF 639(b)). Hartmann presently employs approximately persons. Of these persons, approximately are involved in manufacturing, about are involved in sales and marketing, and about 42 are involved in administration and support. Of the approximately persons involved in manufacturing, about of them are involved in customer service and repair. (FF 640).

Hartmann inspects each piece of luggage as part of its quality control program and only to percent of Hartmann's production are seconds, while returns of Hartmann luggage due to manufacturing defects are percent or less. (FF 664-66). Hartmann has a published 18 month warranty, and repairs its products not subject to undue abuse even after the 18 month warranty period. (FF 667). Hartmann spent an average of on capital expenditures for each of the last five fiscal years, and spent over in advertising for the years 1982-84. (FF 653-54).

Hartmann earned in fiscal year 1985. (FF 684). The ratio of pre-tax earnings to net sales was percent for that year. (FF 684).[46] Hartmann's end of period finished goods inventory increased for all of the products at issue except attaches between 4/30/85 and 4/30/86. (FF 685). Hartmann has developed substantial goodwill in its luggage products.

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[46] *See* p. 84, for discussion of profitability trends.

The administrative law judge finds that the domestic industry is efficiently and economically operated.

X. Substantial Injury

To prevail under section 337 a complainant has the burden of proving that the unfair acts of respondents have the effect or tendency to destroy or substantially injure the domestic industry. 19 U.S.C. §1337(a).47/ A

47/ The injury analysis which follows assumes that complainant has prevailed with respect to the unfair acts, i.e., respondents' infringement of alleged common law trademarks.

complainant who owns an intellectual property right bears a lesser burden, in comparison to a complainant in a non-intellectual property-based investigation, in the quantum of proof of injury it must show to prove a violation of section 337. Textron, 753 F. 2d at 1029, 224 U.S.P.Q. at 631. Every complainant must show, however, that the infringing imports caused the injury to the domestic industry. Certain Centrifugal Trash Pumps, 205 U.S.P.Q. 114, 117 (1979). The unfair acts must be in the importation and sale of the subject articles such that the combination of these two elements destroys or substantially injures the domestic industry. The determination of injury is dependant upon the particular facts of each investigation, and as recently noted by the Commission, "... is not controlled by Commission precedent". Certain Unitary Electromagnetic Flowmeters, Inv. No. 337-TA-230, USITC Pub. 1924, Comm. Op. at 7 (1986), (Flowmeters), citing, Corning Glass Works v. U.S.I.T.C., 799 F. 2d 1559, 1568 230 U.S.P.Q. 822,828 (Fed. Cir. 1986).

The Commission considers several factors relevant to a determination of substantial injury including, but not limited to, declining sales, volume of imports and capacity to increase imports, loss of market share, lost customers, decreased employment, decreased production and profitability, underselling, loss of goodwill, the presence of fairly traded imports and domestic substitutes and excess domestic capacity. See e.g., Milling Machines, 223 U.S.P.Q. at 348,; Certain Drill Point Screws for Drywall Construction, Inv. 337-TA-116, USITC Pub. No. 1365, (1983) (Drill Point Screws); Spring Assemblies, 216 U.S.P.Q. 225, 242 (1981); Certain Roller Units, 208 U.S.P.Q. 141, 144 (1979); Certain Alkaline Batteries, 225 U.S.P.Q. 823 (1984) (Duracell).

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Hartmann has argued that the domestic industry has been injured by respondents' unfair acts as evidenced by: a , price suppression caused by the presence of imported copies, competition between authorized Hartmann dealers and retailers who sell alleged infringing imports which forces the authorized dealers to compete at retail with lower priced copies, an expansion of the supply of products having Hartmann's trade dress and the number of outlets offering imported infringing, a decline in retail sales per authorized dealer, demonstrated substantial foreign capacity, the unfair advantage imported copies have in obtaining a "free ride" off of Hartmann's promotional and capital expenditures and injury to Hartmann's goodwill caused when purchasers or potential purchasers of Hartmann luggage have confused lower-quality infringing imports with Hartmann luggage itself. (CPost at 74-77).

The staff, taking the position that Hartmann has been substantially injured by the unfair acts of respondents, argued that the respondents hold a significant share of the domestic market, have made significant sales of infringing products in direct competition with Hartmann resulting in displaced sales and have traded upon the similarity in appearance of their luggage with Hartmann's luggage which, because of the low quality of the imports, has tarnished Hartmann's quality image. (SPost at 51-55). The staff also agrees with complainant that there is a tendency to injure due to foreign capacity, intent to continue to penetrate the domestic market and foreign cost advantage. (SPost at 55-57). Respondent Starco contends that Hartmann has not proved that the Starco attaches caused any injury to the domestic industry and that any decline in Hartmann's sales could be attributed to problems with the general economy and the inexperience of Hartmann's president, Mr. Much, who was recently terminated from Hartmann. (RPost at 15).

(i) Effect To Substantially Injure

(FF 685).[49/]

48/ Hartmann's sales data were presented on the basis of two different fiscal years, due to Hartmann changing its fiscal year.

49/ The products involved in the investigation account for about percent of Hartmann's total sales. (FF 674).

The Commission determined in Flowmeters that profitability data that included products outside the scope of the investigation did not support a valid conclusion with respect to the profitability of the products at issue in that investigation. *Id*. at 14.

A complainant in a section 337 investigation must show injury and a nexus between the respondents' unfair acts and the injury to the domestic industry. See Optical Waveguide Fibers, Inv. No 337-TA-89, USITC Pub. 1754 (1985) at 10, aff'd sub nom. Corning Glass Works v. U.S.I.T.C., Id. The injury analysis in this investigation is complicated because the imported infringing luggage has been identified with a lower-priced market segment, while Hartmann luggage has been identified with a higher-priced, up-scale market segment. (FF 700-08, 711-12, 734-54).

The record does show, however, that the up-scale and lower-priced market segments are not insulated from one another. (See pp. 71, 72). Certain stores carry both up-scale and lower-priced luggage products, and certain consumers shop for luggage in both markets. (FF 362, 723, 726-28, 742-44). Although imported luggage is generally identified with a lower-price market segment, the overall market share growth of imported luggage indicates that at some price imported luggage competes with higher-priced U.S. luggage. (FF 711, 754). Thus, the administrative law judge finds that a significant overlap between these two luggage market segments exists where direct competition occurs.[50/]

[50/] A similar situation existed in Certain Luggage Products, 337-TA-39 (1978), where respondents argued that imports and domestically produced luggage products competed in separate sub-markets, precluding a finding of injury. The administrative law judge, in an initial determination adopted by the Commission, found that there existed one market, even though certain customers would choose to purchase in only a particular sub-market or price range

(Footnote continued to page 105)

If it is assumed that respondents have infringed complainant's common law trademarks in the importation and sale of attaches, carry-on bags and hanger bags, the record contains evidence that imports of infringing hanger bags entered the United States as early as 1982, and carry-on bags in 1983, although Hartmann's Senior Vice President did not notice such copies in the United States market until 1984. (FF FF 612, 722). Imports of Hartmann infringing carry-on bags and hanger bags totaled 32,993 and 40,229 units, respectively, during 1983-86. (FF 635). Hartmann's annual sales of carry-on models C2 and C3 totaled over units, and annual sales of its hanger bag models H1 and H3 totaled about and units, in fiscal 1985 and 1986. (FF 677-78).

(FF 581). Hartmann's sales of attache models A4 and A9 totaled just over units in both fiscal 1985 and 1986. (FF 676).[51]

Hartmann has estimated both the size of the *total* luggage and business case market, and the size of the *upper segment* of that market. (*See* FF 719).

(Footnote continued from page 104)
because, for example, of name-brand buying, show-off buying or being constrained by a limited budget. The administrative law judge determined that, in general, customers engage in comparison buying, so that competition existed between lower-priced imports and higher-priced domestic luggage. *Certain Luggage Products*, initial determination, at 69-72.

[51]

(Footnote continued to page 106)

Imports of infringing attaches in 1985 represented over 5 percent of the upper segment business case market in fiscal 1986. For luggage products, import market share in the upper segment market was about 1.3 percent. (Cf FF 635 and FF 719).

The administrative law judge finds that the above imports and market shares demonstrate a significant import penetration by the infringing imported luggage products.

Hartmann has supplied evidence of lost sales with respect to three retailers, viz. Wanamakers, Altman/Wieners, and Kingport
During the last seven months of 1984 Wanamakers purchased a total of Hartmann A4 and A9 attaches. (FF 725). During the comparable period of 1985, Wanamakers purchased only Hartmann attaches.

(FF 724-26).

Altman advertised infringing imports and Hartmann hanger bags and carry-ons in the same Altman 1985-86 catalog. Altman offered the imported hanger bag for and the imported carry-on bag for (FF 733). Although the price of the comparable Hartmann luggage was not included in the

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(Footnote continued from page 105)

(See FF 676). Complainant has not accused any respondent of infringing any alleged common law trademark on EC7 and EC8 (FF 122).

catalog, the retail prices during that period for comparable Hartmann bags was $78.20 for the hanger bag and $82.80 for the carry-on. (FF 687). Altman had purchased from Wieners, who in turn had purchased from in Taiwan. (FF 733). Wieners was also a dealer of Hartmann Luggage. (FF 723).

Although a complete list of respondent Kingport's actual customers is not in the record, Kingport sells its luggage to

and some of these customers also carry Hartmann luggage, according to Kingport. (FF 742). In 1985, Bloomingdales purchased $490,199 worth of luggage products from Hartmann. (FF 743).[52]

The record shows that imports of Hartmann infringing luggage were substantially lower priced than actual Hartmann luggage, often by 50 percent or more. (FF 593, 602, 611, 616, 625, 628, 687-88). While a comparison of Hartmann's actual and list prices during mid-1985 for the Hartmann products in issue shows that discounts were generally small,

(FF 687).[53]

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[52] Complainant also cites its decline in sales to stores in the Allied chain alleged to have purchased infringing imported luggage. (FF 728). However, the only evidence with respect to the source of those imports is the testimony of Ms. Penix that she believed the luggage to be imports. (FF 731). Allied's purchases of allegedly infringing luggage cannot be considered in the injury analysis without evidence that the luggage pieces were in fact imports.

(FF 732).

[53] The record does show however that Hartmann has never reduced its prices for its luggage products in response to competition from lower-priced accused imports, and Hartmann has raised its luggage prices during the last few years in line with an inflationary increase of around 3 percent. (FF 696-97; see FF 752).

Complainant has alleged that the importation and sale of infringing imports has undermined the high-quality reputation of Hartmann luggage. (CPost at 76). The Commission has recognized the importance of harm to goodwill, especially in trademark cases, where the "primary function of a trademark under the law is to symbolize the local business goodwill of the domestic owner of the mark." Duracell, 225 U.S.P.Q. 829, 838; Certain Soft Sculpture Dolls, Inv. No. 337-TA-231 (1986) (Cabbage Patch Dolls). See McCarthy, supra, § 3:1. While harm to goodwill is more difficult to measure, it is found to be nonetheless real in this investigation. (See FF 749-52). The record shows that Hartmann has built up significant goodwill for its product. The quality of Hartmann's luggage is high, and it invests heavily in advertising and promotion. (See FF 654-58). The sale price of Hartmann Luggage to complainant in 1983 was substantially higher than the value of Hartmann's assets, reflecting a significant return for goodwill. (FF 753). Goodwill resulting from a reputation of high quality is especially critical for the competitiveness of U.S. luggage producers, who must compete with imported luggage primarily on the basis of nonprice factors such as superiority of quality. (FF 752).[54] In Cabbage Patch Dolls, the Commission determined that evidence of massive imports and harm to goodwill and to business reputation supported a determination of substantial injury. Id at 19.

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[54] See Duracell at 36, where the Commission noted that while quality was not an issue with respect to the imported batteries, the quality of the imported product relative to the domestic product could be crucial in some trademark investigations.

Conversely, the record establishes that the quality of the imported infringing luggage is less than that of genuine Hartmann luggage, See fn. 41 and that certain customers have confused imported infringing luggage for Hartmann luggage. (See pp. 67-72). Any harm to Hartmann's goodwill would have resulted not only from customers who purchased infringing imports believing them to be genuine Hartmann luggage, but also from any potential customers who encountered a lower-quality infringing import and believed such import to be a Hartmann. (FF 713).

Based on the foregoing the administrative law judge finds that the complainant has established that the effect of the infringing imports has been to injure substantially the domestic industry.

(ii) Tendency to Substantially Injure

When an assessment of the market in the presence of the accused imported product demonstrates relevant conditions or circumstances from which probable future injury can be inferred, a tendency to substantially injure the domestic industry has been shown. Certain Combination Locks, Inv. No. 337-TA-45, RD at 24 (1979). Relevant conditions or circumstances may include foreign cost advantage and production capacity, ability of the imported product to undersell complainant's product, and the potential and intention to penetrate the United States market. Certain Methods for Extruding Plastic Tubing, 218 U.S.P.Q. 348 (1982); Reclosable Plastic Bags, 192 U.S.P.Q. 674 (1977).

The legislative history of section 337 indicates that "where unfair methods and acts have resulted in conceivable loss of sales, a tendency to substantially injure such industry has been established." Trade Reform Act of

1973, Report of the House Comm. on Ways and Means, H. Rep. No. 93-571. 93 Cong. 1st Sess. at 78 (1973), citing In re Von Clemm, 108 U.S.P.Q. 371 (C.C.P.A. 1955). In discussing the legislative history of section 337 the Commission noted in Optical Waveguide Fibers, that this quoted phrase is "an apparent attempt to characterize the holding in Von Clemm, rather than a concurrent explanation of the provision relating to tendency to substantially injure. ... The majority opinion in Von Clemm did not explicitly refer to 'conceivable losses of sales' but affirmed the Commission's determination on tendency to injure which was made on the basis of ever increasing imports which undersold complainants articles" Opinion at 13, 14, n. 9.

The injury requirement has never been altered by Congress, and in fact Congress expressly rejected an attempt to eliminate this element from section 337 in the Trade Reform Act of 1973. Textron 753 F. 2d at 1029, 224 U.S.P.Q. at 631 citing H. Kaye, et al., International Trade Practice §6.05 n.1 (1984). While this legislative history suggests a low threshold with respect to the "tendency" language of section 337, the injury has to be of a substantive and clearly foreseen threat to the future of the industry, not based on allegation, conjecture, or mere possibility. In the Matter of Certain Braiding Machines, Inv. No. 337-TA-130 (1983); In the Matter of Expanded Unsintered Polytetraflouroethylene in Tape Form, Inv. No. 337-TA-4 (1976).

In order to find the existence of tendency to injure "the record must establish the existence of relevant conditions or circumstances from which probable future substantial injury can reasonably be inferred." Corning Glass Works v. U.S.I.T.C., 230 U.S.P.Q. at 828. Based on the nature of the market, in this investigation, Hartmann's future competitiveness is critically dependent on maintaining its reputation of high quality in the marketplace. See p. 90.

On the record before the administrative law judge it is found that a significant volume of infringing imports is likely to continue in the future and hence the degree of confusion resulting in harm to Hartmann's goodwill would be directly related to the quantity of infringing imports present in the marketplace. Substantial foreign capacity exists.

(FF 736). The past volume of infringing imports relative to Hartmann's own sales illustrates the importance of this market. In addition, imports have a significant cost/price advantage relative to Hartmann. At least eight producers in Taiwan and Korea have supplied infringing luggage to respondents, and other potential suppliers exist. (FF 735-36, 739-41). The administrative law judge finds that erosion of Hartmann's goodwill, which can continue to occur due to the quantity and lower quality of infringing imports, will translate into an erosion in Hartmann's future sales and profitability.

The combination of confusion among customers between Hartmann luggage and Hartmann infringing imports, the lower quality of the infringing imports, the importance to Hartmann's competitiveness of maintaining its high-quality reputation, and the significant quantity of infringing luggage that has been imported into the United States relative to Hartmann's sales, are sufficient to establish the existence of circumstances that will result in probable future substantial injury to the industry at issue.

For the above reasons, the administrative law judge finds that the complainant has met its burden in establishing that there exists a tendency to injure substantially the operations of Hartmann devoted to the production of the luggage products in issue.

FINDINGS OF FACT

I. Jurisdiction

1. The Commission has in rem and subject matter jurisdiction in this investigation, under section 337, because the complaint alleged unfair acts involving the importation into, and sale in, the United States of certain luggage products, the alleged effect or tendency of which is to destroy or to injure substantially an industry, alleged to be efficiently and economically operated in the United States.

2. Service of the complaint and notice of investigation was perfected on each of the twelve respondents identified in the notice of investigation.

II. Parties and Products In Issue

Complainant

3. Complainant is Lenox, Incorporated (Lenox), 100 Lenox Drive, Lawrenceville, New Jersey.

4. Hartmann Luggage Company (Hartmann), founded in 1877, was sold to Lenox on February 1, 1983. (Katz SPRX-2 at 1).

5. Hartmann manufactures luggage products. The products in issue are four types of luggage--attache cases, hanger bags, carry-on bags and soft pullman suitcases. Specifically these four types include: (1) those manufactured and sold by complainant as model A4 and A9 attache case; model H1

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and H3 hanger bags; model C2 and C3 carry-on bags; and soft pullman suitcases; and (2) alleged copies of the same types of luggage manufactured, imported and or sold by respondents. (Penix CX-24; Nehmer CX-70).

Respondents Starco and K mart (only accused product is attache)

6. Starco is located at Room 503, No. 3 Lane, 127 Chang Taung Road, Taipei, Taiwan. (SX-6, Ans. to Int. Nos. 1 and 2).

7. K mart, located at 3100 West Bag Beaver Road, Troy Michigan 48084,

Respondent Dimensions (accused products are hanger bags and carry-on bags)

8. Dimensions is a division of Marketing Associates of America, Inc. and is located at 2345 Millpark Drive, Maryland Heights, Missouri 63043. Dimensions is in the business of direct response marketing of various products including luggage. (SX-10, Ans. to Int. Nos. 1 and 3).

9. Dimensions

(SX-10, Ans. to Ints. 6-9, at 5-9).

10. Between 1982 and 1986, Dimensions sold

(SX-10 Ans. to Int. No. 10).

11. Dimension was terminated from the investigation pursuant to a Consent Order Agreement.

Respondent Kingport (accused products are hanger bags and carry-on bags)

12. Kingport is an Illinois corporation having its principle place of business at 1228 Emerson Street, Evanston, Illinois 60201. Kingport imports and sells luggage. (SX-8, Ans. to Int. Nos. 1 and 13).

13. Kingport was terminated from the investigation pursuant to a Consent Order Agreement.

14. Between 1982 and 1986, Kingport stated it has

(mopdel 8). Invoices supplied by Kingport accounted for sales of the following quantities during 1983-85:

(SX-9, Ans. to Int. No. 10, attached invoices. CX-128, Ans. to Int. No. 6. at 3).

15.

(SX-9, Ans. to Int. No. 13 at 2).

Respondent Monarch (accused products are hanger bags and carry-on bags)

16. Monarch is a New York corporation located at 5-19 Delavan Street, Brooklyn, New York 11231.

Monarch was terminated from the investigation pursuant to a Consent Order Agreement.

Respondent Montgomery Ward (accused products are hanger bags and carry-on bags)

18. Montgomery Ward is located at One Montgomery Ward Plaza, Chicago, Illinois 60671.

19.

(CX-132, Ans. to Int. No. 6; SX-12, Ans. to Int. Nos. 1 and 6). Montgomery Ward was terminated from the investigation pursuant to a Consent Order Agreement.

Respondent Pedro (accused products are hanger bags and carry-on bags)

20. Pedro is a Minnesota corporation having its principle place of business at 104 E. Tenth Street, St. Paul, Minnesota 55101.

21.

(CX-136, Affidavit of Carl Pedro).

22. Pedro was terminated from the investigation pursuant to a settlement agreement.

Respondent Pungkook (accused products are soft pullman bag, hanger bag and carry-on bags)

23. Pungkook is located at CPO-Box 5219, Seoul, Korea.

24. Pungkook was terminated from the investigation pursuant to a Settlement Agreement.

25.

(Settlement Agreement, 3(a) & (b)).

Respondent Wetyle

26. Weltyle is located at No. 7, Alley 9, Lane 5, Chung Shan North Road, Taipei, Taiwan. (SX-11, Ans. to Int. No. 30).

27. Weltyle was terminated from the investigation pursuant to a Consent Order Agreement.

Respondent Winn

28. Winn is an Illinois corporation located at 6001 North Clark Street, Chicago, Illinois 60660.

29. Winn was terminated from the investigation pursuant to a Settlement Agreement.

Respondent American Guard-It

30. American Guard-It is located at 1240 N. Homan Avenue, Chicago, Illinois 60651. American Guard-It is engaged in the manufacture, importation and sale of luggage. (CX-129 at 5; CX-130).

31.

(CX-129 at 7-8, 18, 24-26).

Respondent Pei Lin

32. Pei Lin is located at 45-A No. 124, Sec. 2, Nanking E. Rd., Taipei, Taiwan. Pei Lin is engaged in the manufacture and sale of luggage.

(A club tote, not in issue in this investigation, was also part of the set).

III. The Alleged Common Law Trademarks and Secondary Meaning and Infringment

33. Hartmann was founded in 1877 by Joseph Hartmann, a trunk maker. who came from Bavaria, worked for a large trunk company in Milwaukee and decided he did not like the quality of what the company was producing. In 1877 he quit the large trunk company and formed his own trunk company called the Hartmann Trunk Company. He moved it to Racine, Wisconsin in 1905 and Ira Katz started with the company in 1955 when the Katz family bought Hartmann. (Katz SPRX-2 at 1, 2).

34. In 1957 the Hartmann manufacturing facility was moved from Racine, Wisconsin to Lebanon, Tennessee with the exception of the leather manufacturing portion which was retained in Racine until the mid 1970's when it too was moved to Lebanon. (Penix CX-24 at 2).

35. Katz retired from Hartmann in 1985. Katz started with the company in 1955 as executive vice president and became president in 1957. He became chairman and "C. E. O." in 1959. He now does some consulting for Lenox, Inc. Hartmann's parent company. Katz sold Hartmann to Lenox, Inc. on February 1, 1983 and Katz agreed to stay for two years to train his successor. (Katz SRPX-2 at 1, 8, 9).

36. Dorothy Penix is currently Senior Vice President of Hartmann Luggage Company. She joined Hartmann in 1968 as administrative assistant to Katz, then president. In 1972 she became Director of Purchasing and Production Control and later became Vice President of Advertising. In 1981 she became Vice President of Marketing and in 1984 became Senior Vice President of Operations. (Penix CX-24 at 1).

37. In 1963, Hartmann made the decision that if it was going to grow, it had to develop a quality and up-scale product, completely different, than anything else on the market. In around 1963 or 1964 Hartmann developed a completely new design for a series of luggage to which the name International was given. That is when Hartmann developed its square shape which was taken from Hartmann's own Skymate, a hardsided, very expensive case that had been made in rawhide leather. Hartmann working from the Skymate design, changed it to a much lighter, soft-sided case. The handle and locks were changed and it looked like what was thought a really quality up-scale case should look. Every size in the International series is made in four price ranges. There is an attache in the highest price point and in the next highest price point and in the next and in the lowest price point. The highest priced attache is in belting leather, the lowest is the vinyl. All the bags, except for the

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covering, called the skin and a few other "minor things" are identical. (Kat: SRPX-2 at 4, 5, 6, 7).

38. The Skymate case was a hard rectangular box made out of very light weight but strong wood. The pieces of the box were put together so that they did not quite touch. A piece of hard vulcanized fiber was put around the outside of both parts and sewn to the box. Even though the box was hard, it had tremendous flexibility because of the way it was made. Exteriorly it looked very much like the International except that the sides were hard instead of soft and the binding, instead of being sewn on the top as the International, was sewn to the box on both the top and the sides. (Katz SRPX-2 at 46, 47).

39. Comparing the external appearance of the International attache and the Skymate, the side panels of the Skymate were hard wood (the gusset) and the binding was not vinyl as in the International. It was hard vulcanized fiber and came across the top and down the side the same distance. The handles were different. The locks on the Skymate were more conventional. There were no flaps over the lock. The similarity was in the construction of the box and the square shape of the box. The Skymate, which was the only square-shaped luggage, without rounded corners, was the most expensive Hartmann made in the early sixties and also the "most functional, because obviously with square corners you can pack more." (Katz SRPX-2 at 47, 48, 49).

40. In 1963, when Mr. Katz introduced a new look for the Hartmann Luggage Company, this look included cases that were much lighter looking, had many unique features and continued the quality credo of the company. The new look, known as the International Series, is said to be shown in CPX-1, CPX-2, CPX-3, CPX-4 and CPX-5. CPX-1 is a 24 inch pullman suitcase in walnut tweed

fabric which suitcase also came in twenty inch, twenty-six inch and twenty-nine inch sizes and was also available in leather. CPX-2 and CPX-3 are the A4 and A9 attache cases in belting leather. In 1963 they were called the A3 and A8 attache cases. CPX-4 is said to be the A4(A3) attache case in vinyl. CPX-5 is the A4(A3) attache case in walnut tweed. The International Series also was said to include a men's two-suiter and a men's three-suiter plus another carry-on for the men which had fixtures for hangers to hang up the suits. (Penix CX-24 at 3).

41. The styles of the International Series were all square shaped, had lock flaps, had the saddle handle with raised stitches and a riveted ridge over the figure-8 extrusion forming the handle that attached to the top of the case and the valance that went around the middle point of the case where the top met the bottom and the bumper or the extrusion around the outer edge of the panel. These features created what Ira Katz considered to be the Hartmann look. (Penix CX-24 at 3, 4).

42. What was recognized instantly as being different in the International Hartmann attache was the soft panel, because all attaches when the Hartmann International was introduced were hard; also the picture frame binding because attaches generally had no binding; the handle and the outside valance and the fact that the locks were covered were important in the International Hartmann attache. Valance means closure and there has to be some kind of closure on any case. (Katz SRPX-2 at 63, 109).

43. The Touch-O-Matic lock is a part of the Hartmann look only in that it is recessed and therefore the flaps can cover it without having a lump. The lock has many technical advantages but in terms of the Hartmann look, it is not an important part. The strikers are unique but they are not

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an important part of the Hartmann look because they are metal and have to be a part of the lock. The hinges and gliders are not part of the Hartmann look. (Katz SRPX-2 at 64, 65).

44. The stitching, to anyone sophisticated enough to look at it, is uniquely Hartmann. Hartmann stitching is four and one half to five and one half stitches to the inch. It is part of the Hartmann look but not immediately recognizable. The fact that the binding does not come all the way around the side is recognizable by a consumer. It is believed that the average consumer would not be aware that the Hartmann corners are thick and have a patented vulcanized fiber insert. The rivets are unique in the sense that although they are hardware, the "Hartmann look is a very functional look" and the rivet is a sign of strength and hence the rivet was left exposed. There may be other companies that leave the rivet exposed. The edging of the material as to how it is finished, i.e. a raw polished edge, is not unique. (Katz SRPX-2 at 63, 64, 65, 66, 67).

45. The word "International" became very loosely used as time went on. There has been minor changes in the International series since 1963 which have included technical improvements to the construction. Most of the outer fabric and outer colors have changed. The belting leather which was started in 1964 has remained absolutely identical. It is the same belting leather that is obtained exclusively from a supplier in Canada. Belting leather by itself is a development by Hartmann going back to the belts that turned the power station. The walnut fabric series, the third highest price point or second lowest, was introduced in 1965 and has not changed since then. The same fabric is still bought from the same supplier. The lowest price point, the vinyl, has changed in colors frequently over the years but it is always

the best quality vinyl that could be found. An ultrasuede, which had been a second highest price point, has been discontinued. Katz testified that the Hartmann look has not changed. (Katz SPRX-2 at 10, 11, 60, 61; Penix Tr. at 83).

46. Three people were involved in the design of the International. Harvey O'Neil, Hartmann's chief designer, was the technical part of the design team: Jean Bandler, a freelance designer, was responsible for the fashion part, the color part, and Katz was responsible for supervising both of them and the marketing aspects of the case. (Katz SRPX-2 at 11).

47. The whole case in the International series was different. There were no square-cornered cases on the market, except trunks and the Skymate that Hartmann had developed the International from. The Hartmann International has square corners. The square corners have a functional advantage in that they pack more in cubic capacity. Also it was felt they gave a very high quality, understated, up-scale look that rounded-corner cases did not give. The handle was designed by Jean Bandler. It was inspired by an Italian handle, but an improvement on the Italian handle. The Italian handle had a figure-8 loop which is a basic configuration of the International handle. The figure-8 handle was on a manufacturer's luggage in Italy. Whether it was on more than one, Katz did not know. It did not have the edging turned out and stitched on the outside. The edging on the Italian handle was either turned up or down. The Italian handle had a saddle but the saddle did not have the ridge on top. The recessed patented locks were unique. The advantage of the recessed lock was that it was flush and could not be knocked off, because 70 percent of all the trouble with luggage at that time was in the locks. It was imperative to make that point even stronger and

thus to cover the locks. To have covered them from the back of the case across the top and down the side would have been the way everybody else would have covered the locks so Hartmann developed what was thought to be a unique, very attractive way to cover the locks. The flaps emanated from the handle and covered the locks. The outside valance, which is the strip of material that runs around the case where the top meets the bottom was thought to be unique. Most everyone used inside valances at that time because they were cheaper and easier to put on. The way the name plate was put on was different and it was thought better. Most name plates were put under the handle where the consumer only could look at the brand name. The name plate was put on the side of the case because it was felt that people would be proud of their Hartmann and would like to have other people know what it was so that it could be seen as the customer walked down the street. Those were the major features. The construction of the square box was a technical thing but had tremendous flexibility because of the way it was built out of four separate pieces of wood that did not quite touch in the corners and they were joined by pieces of hard vulcanized fiber. That was said to be really the secret of the International that people who copied it never bothered to do because it was very expensive. The idea of the set-in panel in the International was not unique with Hartmann. The way Hartmann did it is probably unique. Hartmann had made a soft panel construction before Katz came to Hartmann. However it was not square. A picture-frame look with the binding and panel set-in was unique to the Hartmann attache case. There were no soft-sided attache cases. It was not unique for luggage. The outside valance was taken from the Skymate. Katz believes the initial designing of the International was done with the women's 24-inch but it did not matter. Hartmann knew once it finished working the initial case that it would adopt the look to all of its sizes. The attache was not introduced until one year later. (Katz SRPX-2 at 12, 13, 49, 50, 51, 53, 54, 55).

48. The Hartmann look is said to be a very classic, tailored, understated prestigious look. What makes the Hartmann attache case unique is that there is very little hardware showing, the handle is a very classic looking handle and the square look is classic looking as opposed to rounded corners and all those elements put together Katz feels make for what is the Hartmann look. (Katz SRPX-2 at 58, 59, 60).

49. Ms. Penix testified that she would not attempt to dissect the Hartmann look; that in her opinion it is the total look of the Hartmann case; that she does not think it is a lock strap, a shoulder strap or whatever; that it is the total look, the sum total of everything that goes into the case. (Penix Tr. at 78, 79).

50. Exhibit CPX-5 is a Hartmann case but the total sum of Hartmann look is not limited to attache CPX-5. The case has a Hartmann look. When asked whether there are several Hartmann looks, Ms. Penix testified that "it is the sum total of our entire line that presents a collection or a family resemblance;" that "[p]arts on the case [CPX-5] are not applicable to other parts, and so I have to take the total sum of Hartmann's offerings to read the Hartmann look." The Hartmann look would include another attache CPX-3 and the carry-on CPX-9 and the hanger bag CPX-6. CPX-5 and CPX-3 have the Figure 8 handle. The carry-on CPX-9 does not have the Figure 8 handle but it has a saddle handle that is said to be carried over from the other two attaches CPX-5 and CPX-3. (Penix Tr. at 105, 106).

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51. Ms. Penix testified that "[a]gain, this case had the same Hartmann family resemblance of the trim, the handle and many unique features found in only Hartmann bags on the market." (CX-24 at 5, 6). Ms. Penix was referring to the CM/CW bag. The derivative of that bag would be the C3 or the C2 carry-on bag. CPX-39 would be the C3 bag. The CM/CW was the forerunner. (Penix Tr. at 131, 132).

52. The fabric and color of some of the products involved is part of the Hartmann look according to Ms. Penix, but is not the "dominant portion" (Penix Tr. at 266, 267).

53. Ms. Penix considered the unique and dominant portions of the Hartmann look with respect to the belting leather Hartmann CPX-2 A-4 attache to be the lock straps that are snapped to the sides of the A4 case. They extend from the handles over the locks. They emanate from the figure-eight handle in the center of the attache which handle comes up to form an arc around which a saddle is adhered to make a "comfortable handle" that is stitched on the tip with rivets. These features coupled with the square shape, "obviously the Hartmann name" would be the dominant features of CPX-2. The 4400 walnut tweed Hartmann CPX-5 attache is trimmed in belting leather, on the handles, the lock flaps and the side gussets. The dominant features of the CPX-5 would be the lock straps coming from the figure-eight handle and the saddle that wraps around the handle with the stitching and the rivets on top and the square shape. With respect to the CPX-3 Hartmann all belting leather attache, which is a little wider than CPX-2, A9 all belting leather attache, the dominant features are the handle straps, the lock straps, the figure-eight handle with saddle, the stitching, the rivets and the square shape. The dominant features of the CPX-11 (the EC7 belting leather attache) are the lock

flaps, even though they may not cover a lock, which emanate from the figure-eight handle and come up and forms an arc with a saddle wrapped around it. Thus the dominant features of the CPX-11 are the handle, the figure-eight, the lock straps and the square shape. (Penix Tr. at 268, 269, 270).

54. CPX-1 is an example of the Hartmann walnut tweed 24-inch pullman case trimmed in belting leather. It is an International style. It comes in different fabrics. CPX-4 is an A4 style in the 4200 camel vinyl. (Penix Tr. 272, 273, 274).

55. At Hartmann the products are broken down into four categories: (1) the International series, (2) the Executive or the attache series, (3) the casual cases which would be the carry-ons and the hang bags and (4) the personal accessories which would be the wallets, travel kits etc. The Hartmann pullman CPX-1 is categorized as International but other products, such as attaches A4 and A9 have the International styling. Up until probably 1983, the A4 and A9 were International and Hartmann then decided to combine those and make them into the business case section or the Executive Collection of Hartmann luggage. The attaches do have the International sytle. They encompass two styles, A4 and A9, that were originally in the International style. The attache cases are in the International line but no longer are they classified as an International case at Hartmann. The International style goes over into the business case style. The A4 and A9 are smaller Internationals. (Penix Tr. at 275, 276, 278, 279, 322).

56. The International started with the Hartmann look. Today if somebody wanted to buy an attache case to match an International series case,

the person would buy a case as part of the Executive Collection. (Tr. at 276, 277).

57. When Ms. Penix was asked how she would describe the Hartmann look with respect to the Hartmann C3 carry-on bag (CPX-8) the testimony was "I would not attempt to dissect that bag. In total, it looks like a Hartmann case." The testimony followed:

> Q. Well, that is because you are Senior Vice President of Hartmann it looks like a Hartmann bag, but to a consumer why would that look like a Hartmann bag to a consumer?
>
> A. I can't answer for a consumer. I can only answer what we have tried to build into that case [CPX-8] to make it look like a Hartmann case. It is the total image of it, the total overall appearance, the sum of it.
>
> Q. Well, Mr. Lerner, in his opening statement, mentioned a shortened lock flap sewn onto the bottom here of the pocket. Is that part of - -
>
> A. That would be one of the aspects of the Hartmann look to me, yes, the strip across the middle and the shortened lock flap.
>
> Q. That would be a unique feature of the Hartmann luggage?
>
> A. We felt it was unique to us because it simulated some of the other parts of our line.
>
> Q. Was it elsewhere in the market at the time when you adopted it?
>
> A. To my knowledge, it was not in the market at the time that we adopted that bag in '73. The forerunner of that bag, the CM/CW, had basically that same look.
>
> . . .
>
> Q. Are the handles that come up from the bottom of the case and become attached by a saddle with snaps on either side, is that unique to Hartmann carry-ons?
>
> A. That was unique to the original version of that bag because that is a very expensive way to attach a handle.
>
> Q. Which is very expensive?

> A. Coming up from the bottom. Most people would look at that and say from the rivet down is wasted leather. Hartmann feels that is a quality advantage, that the weight is pulled from the bottom of the bag. Some manufacturers would stop at the rivet and let the weight hang on the rivet.
>
> . . .
>
> Q. So that would give you strengthening of the handle, wouldn't it?
>
> A. It would serve the function of strengthening of the handle, yes.

(Penix Tr. at 133, 134, 135).

58. Ms. Penix testified that "This hanger bag [HM and HW introduced in 1973] also carried over the Hartmann family resemblance and styling, the handle, the square shape, the trimming, all of which were similar to the International series" and that CX-5 was an old ad that showed the HM and HW. (CX-24 at 4). She further testified that those features mentioned were not an all-inclusive list but that the features were a portion of what she considers to be the Hartmann look. (Penix Tr. at 136; CX-24 at 4).

59. Referring to hanger bag H3 (CPX-6), Ms. Penix testified that the trimming would be the handle board across the middle; the leather across the middle would be the leather trim; and the welting along the edges would be the final extrusion running along the edge of the gusset. The handle, the shoulder strap, the way it is affixed to the case, are part of the family resemblance. (Penix Tr. at 136, 137).

60. With respect to the loops associated with the handle in the Hartmann hanger bag, they allow the handle to go flat and they also carry over the Hartmann resemblance. (Penix Tr. at 138).

61. Attaches CPX-5 and CPX-3 have lock flaps that extend across the narrow top, parallel to the narrow access. There are no locks on the C2

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carry-on CPX-9 over which lock flaps could extend. Lock straps are not on hanger bag CPX-6 but there are simulated lock straps to portray the same look, viz. the configuration on the handle where the lock straps emanate. (Penix Tr. at 107, 108).

62. Hartmann hanger bag CPX-6 is an H3 series and has a similar look to the H1 Hartmann CPX-7 hanger bag. CPX-7 is a thinner bag. Part of the look of the CPX-6 are the dual pockets with the buckle flaps on the bottom part of the lock of the bag. The CPX-7 H1 thinner style hanger bag does not have the flap pockets. It has double pockets. When asked:

> Q. So the Hartmann look is limited here [H-1 CPX-7] to what aspects of its appearance?
>
> A. Here again, I would not attempt to dissect that case. It is the total appearance of that case.

(Penix Tr. at 129, 130).

63. CX-32 are copies of the Publishers Information Bureau records of Hartmann ads for 1970-1986 and media flow charts and advertising schedules showing ads runs for Hartmann luggage for 1979-1984. (Penix CX-24 at 20).

64. The first page of CX-33, which is an ad, features what is said to be the overall appearance. The second paragraph of the ad, viz.

> And we indulge them all with the same tender loving care and craftsmanship. Little big things like all nylon zippers and individually lined pockets . . . for extra mileage.

promotes a quality, caring image. Quality is an intangible part of the Hartmann look. It is very "tangible" in the product, but it is part of the "intangible" product. The first page of CX-33 talks about some features and their benefits and the various styles shown. The word "Hartmann" appears in the small print of the text and it also appears in the Hartmann logo on the ad. The phrase below the Hartmann logo "[w]e don't cut corners," is a

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trademarked slogan for Hartmann. The slogan is in all of Hartmann's most recent ads. The slogan would contribute to consumers' identification with the products shown. The third page of CX-33 is not an ad by Hartmann but rather an ad run by Crown Plaza. (Penix Tr. at 171, 175, 176).

65. Ms. Penix testified that the fan display of all the briefcases in the ad on the fourth page of CX-33 is the ad's focal point. However the fan display is not restricted to the products in issue. The text of the ad gives the consumer a reason to buy what is shown in the focal point. The first column reads in part: "After all, Hartmanns are known for their ability to survive the relentless pressures of executive life. Without sacrificing their distinctive look of quality." This, in advertising terms, Ms. Penix testified is a clever way to say that the Hartmann cases are durable. The next paragraph of the ad reads:

> So it should be no surprise that the Executive Collection features our famous industrial belting leather or full grain leather in brown or burgundy. For a soft, supple surface that's extraordinarily resistant to scratches.

This paragraph is referring to two types of leather. It features Hartmann's industrial belting leather or full grain leather in brown or burgundy. The paragraph is promoting the leather as part of the overall appearance of the cases because Hartmann is known for its belting leather and hopefully Hartmann is being known for its other leathers. (Penix Tr. at 178).

66. The ad (fourth page of CX-33) refers to the use of real spring steel sewn into all the edges. The ad is an early version. The spring steel has been substituted by material called a dual durometer that serves the same function as the spring steel, i.e. to stiffen the edges. The ad has the Hartmann logo and the trademark "We don't cut corners." (Penix Tr. at 178, 179).

67. The ad on the fifth page in CX-33 is a Hartmann ad and it shows two of the Hartmann products and the ad itself is said to be dominated by 90 percent of the Hartmann products. However the ad does not show the complete overall appearances of the two products. The text of the ad states in part: "When we make Hartmann luggage, we never cut corners. We keep them nice and square. And for good reason. There's less wasted space in square corners. So you can pack more." According to Ms. Penix, that paragraph "very dramatically" promotes the overall appearance of the luggage cases. Also it more or less talks about the aesthetics of the square corner, plus why it is that way. The aesthetics "being that is the Hartmann look, the square shape, part of the Hartmann look" and then the ad tells why it is square so you can pack more, the function part of it or the reason, rational for it being there. The ad also reads in part:

> But Hartmann is more than right angles (if that weren't so, we'd just be an overpriced box.)
>
> There are lots of other ways we don't cut corners.
>
> Our master craftsmen tailor each exquisite detail of our luggage. Stitch by stitch. From the handle to the inside lining.
>
> And we wrap our luggage in only the most luxurious coverings: industrial belting leather (with natural markings, as seen on front case), nylon fisherman's packcloth (rear casual bag), Ultrasuede, nylon tweed and vinyl).
>
> The result, a triumph of function and style, durability and beauty, good looks - and brains.
>
> You'll never find a production shortcut - or a cut corner in a Hartmann. Which is why Hartmann isn't the cheapest luggage you can buy. It's simply the best.

The ad has the Hartmann logo and the trademarked slogan "We don't cut corners." (Penix Tr. at 189, 190).

68. The sixth page of CX-33 has three Hartmann products which are the focal point of the ad which is titled "Sometimes the Best Christmas Presents Come After Christmas." The ad states in part:

> And when we say leather trimmed we mean Hartmann's famous industrial belting leather. Then there are all the other features we're famous for.
>
> Our indestructible walnut fabric, or our 100% Dupont nylon fisherman's pack-cloth. Frames that can be crushed without breaking. (They spring right back.) Stitching that will never deteriorate. Fastenings that won't rust. Plus lots of other details that make Hartmann Hartmann.
>
> When you consider that all year long people willingly pay full retail prices for Hartmann - at 20% off, it's a gift.

The ad shows a picture of Hartmann luggage and has in script, larger than the regular type, the Hartmann logo. The text of the ad describes various features of the products. (Penix Tr. at 190).

69. The eighth page of CX-33 is a Hartmann ad titled "Hartmann presents the collection that nobody can match. But you." The ad promotes the Hartmann look and the three cases depicted dominate the ad. One case is shown as a "seductive" check. The text of the ad supports the three products that are being shown and also the Hartmann look. The text focuses largely on the features and the quality of the materials and craftsmanship used. The text states in part:

> First Hartmann gives you three distinctive coverings. One in leather, two in fabrics. Different patterns. Different shapes. Then you marry them. Or keep them single.
>
> Whether you fall in love with Sandstone (our subtle tweed), or Shadowbox (our seductive check), or Taupe (our smooth and supple leather), you don't have to choose just one. From the largest pieces of luggage to the smallest totes and portfolios - they're all compatible.
>
> It's almost impossible to resist the newest Hartmanns, especially with features like these: The beauty of wool and the

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> durability of nylon. The softness of the most sumptuous leather. The turned edges for a tailored look.
>
> Also the 24K gold-plated hardware on out larger framed pullmans. It won't ever tarnish, peel, rub off or rust.
>
> Our famous Hartmann zippers won't leave you in a jam. Our nylon thread lasts a lifetime and our soft-padded contoured handles hold your hand. Renderly.
>
> Sandstone, Shadowbox and Taupe . . . The Coordinates from Hartmann.

The ad has the Hartmann logo and the trademarked slogan "We don't cut corners." It is dated 1985. (Penix Tr. at 191).

69a. The Hartmann ad on the twenty-eighth page of CX-33 has in bold type "When we named this luggage Oak and Granite, we had our reasons" and in small type states in part: "This is luggage, so durable, Hartmann actually invites you to stab it, poke it, jab it, scrape it - and see how it comes through unscratched. Not a mark on it." The Hartmann ad on the twenty-ninth page of CX-33 states in part "When it comes to leather luggage, you should judge every case by its cover. ... For years Hartmann has used only genuine industrial belting leather in its leather luggage. Not only because of its natural beauty, but because of its natural strength ... and weak [other companies' luggage], because the top layer is buffed off to disguise all the scars. insect bits, fat wrinkles and other signs of character Hartmann leaves on. Because of that, every Hartmann is different from every other Hartmann."

70. The Hartmann logo and the trademark slogan "We don't cut corners" is fairly typical for Hartmann's ads. (Penix Tr. at 191).

71. A Hartmann current product brochure (1985) states that Joseph Hartmann, who started his own luggage company in 1877, set a standard which makers of fine luggage have sought to follow ever since; that today that

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commitment to excellence still endures "at Hartmann", that "[w]e still use only the finest materials, such as our exclusive Industrial Belting Leather, in our products. And we still take the time to make everything meticulously by hand." It is said that it is "this insistence on quality that makes every Hartmann -- whether luggage, attache ... a superior product, one that you can enjoy for a lifetime." In describing "Hartmann's exclusive industrial belting leather 4700 Series", it is stated that it is absolutely "the finest collection Hartmann makes," that each piece is, "hand-crafted with our exclusive Industrial Belting Leather that acquires a rich lustrous patina over time"; that the choicest North American steerhides, vegetable tanned in "our unique age-old process" are used; that after tanning, time is taken to put back in the natural oils and greases so that that "if a Hartmann gets bruised. the blemish can be rubbed out, bringing the deep greases back to the surface; and that the "result is a rich distinctive piece that affirms your commitment to quality and good taste." A picture of the 4700 Series, which includes the C2 carry-on, is shown. (CX-35 at 2).

72. The 1985 Hartmann product brochure, in describing the walnut tweed fabric trimmed with belting leather, 4400 Series, states that the series is crafted "with impeccable Hartmann style from the most durable luggage fabric ever developed;" viz. 100% super-strength cationic nylon that looks and feels like wool; that "[o]ur nylon won't ever scuff or fray"; that the nylon is treated with TEFLON for easy cleaning so dirt and grease won't stick; and that each case carries "our classic tweed pattern and is trimmed with our exclusive Industrial Belting Leather being built with the same quality construction that "sets every Hartmann apart." Pictures of the 4400 Series in walnut tweed fabric trimmed with belting leather is shown. (CX-35 at 3).

73. The 1985 Hartmann product brochure, in describing Hartmann's nylon fisherman's packcloth trimmed with belting leather, 4400 Series, states that the 100% nylon fabric makes each piece lightweight yet extremely strong and durable; that "[o]ur material is urethane coated to protect the interiors from moisture and treated with TEFLON to repel airport grease, dirt and stains"; and that naturally each piece is beautifully trimmed "with Hartmann's renowned Industrial Belting Leather." It refers to the classic look for the well-dressed traveler. A picture of this 4400 Series, which includes the C3 carry-on, is shown. (CX-35 at 3).

74. The 1985 Hartmann product brochure, in describing the Navy packcloth trimmed with camel vinyl, 4200 Series, states that this striking collection is covered in "Hartmann's 100% nylon fisherman's packcloth and superfly trimmed with a sub camel-toned vinyl; that the light yet extremely strong construction makes the collection almost indestructible as well as convenient to carry; that many of the pieces come with Hartmann's exclusive non-slip shoulder strap that remains securely in place; and that the packcloth casual styles coordinate handsomely with "our framed construction camel vinyl packing pieces." A picture of this 4200 Series, which includes the C3 carry-on, is shown. (CX-35 at 4).

75. In describing the coffee packcloth trimmed with peanut butter vinyl, 4200 Series, the 1985 Hartmann product brochure states that for this classic series, "Hartmann uses its famous peanut butter vinyl;" that the casual cases are hand-tailored from "our tough 100% nylon fisherman's packcloth;" that this lightweight material is exceptionally strong; that each packcloth case is trimmed handsomely in vinyl to accent "our traditional coffee fisherman's packcloth; that the coordinating framed cases feature a

rugged peanut butter vinyl exterior; that all feature "Hartmann's renowed products, zippers, handles and straps that enhance traveling convenience." A picture of this 4200 series, which includes the C2 carry-on, is shown. (CX-35 at 4).

76. CPX-8 has been identified as a Hartmann C3 carry-on bag in pack cloth with leather trim. CPX-9 has been identified as a Hartmann C2 carry-on bag in packcloth with leather trim.

77. The 1985 Hartmann product brochure states:

> Comfortable Handles. Hartmann's famous hand-sewn Italian style handles always remain comfortable and they're bolted all the way through the frame for exceptional strength and durability.

A picture of the handle is shown. (CX-35 at 5).

78. The 1985 Hartmann product brochure states:

> Flexible Frame. Because the basswood pieces of the frame don't quite touch at the corners, but rather are joined by a flexible fiber, a Hartmann bends when bumped. It doesn't break.

A picture of a partial upper portion of a Hartmann attache case is shown. (CX-35 at 5).

79. The 1985 Hartmann product brochure states:

> Superior Thread and Fabric. Using only the finest leather and other fabrics, we sew each piece with 100% nylon thread that can never rot, mildew or abrade. And we use more stitches per inch for superior strength to help each piece last a lifetime.

(CX-35 at 5).

80. The 1985 Hartmann brochure states:

> Patented Touch-O-Matic. Hartmann locks open and close with one simple touch. They're recessed and covered with flaps for extra protection to prevent damage to the lock - the source of most trouble with other luggage.

81. The 1985 Hartmann product brochure states:

> The features that make Hartmann superior.
>
> We build every Hartmann, regardless of its style or

> covering, with the same unique features - features that you'll find in no other luggage. As a result, when you have a Hartmann, whether it's our exclusive Industrial Belting Leather or our 100% nylon fisherman's packcloth with vinyl trim, you are carrying a piece of luggage that is unsurpassed for quality.

(CX-35 at 5).

82. The 1985 Hartmann product brochure in referring to "What sets a Hartmann apart," refers to "A tradition of quality," "The finest materials," "Rugged durability," "An unmatched variety," "Designed to meet your needs," "Handy accessories" and "A full 18-month guarantee." (CX-35 at 5).

83. The 1985 Hartmann product brochure states:

> Attaches
>
> Hartmann's famous attaches are available in a variety of styles and coverings, each built with a solid wood frame that makes it flexible, light and strong. Each handsome case is crafted with a luxurious coordinating interior, generous pockets, and our exclusive 24K gold-plated locks. Soft, padded, contoured hand-stitched handles ensure that each attache is comfortable to carry. Premium leathers, fabrics and vinyls are used to create a durable business companion that makes a lasting impression. Little wonder, then, that Hartmann attaches are recognized the world over as a mark of the successful business person.

A picture of the Hartmann attaches, including the A4 attache and A9 attache is shown. (CX-35 at 6).

84. CPX-2 is a Hartmann A4 (A3) attache in belting leather; CPX-3 is a Hartmann A9 (A8) attache in belting leather; CPX-4 is a Hartmann (4(A3) attache case in vinyl; and CPX-5 is a Hartmann A4(A3) attache in walnut tweed.

85. A Hartmann ad showing four man's Carry-Ons in belting leather, ULTRASUADE, fabric or vinyl and which has in large type "The Difference Between Them is Only Skin Deep" and "Hartmann" states in part: "Bump the identical frames and they'll bounce right back to their original shape," "And

the soft sides swell out to hold more in," "Our handles are carefully sewn by our hands so they're comfortable for yours," "And while those fashionable outside flaps cleverly hide our TOUCH-O-MATIC locks, every model wears a DIAL-O-MATIC lock too . . . ," and "So whatever skin you want, style you pick. or price you [p]ay, you get the same priceless Hartmann name. And the same features, fashion and quality that make it so priceless." (CX-2).

86. A Hartmann ad, which has in large type "HARTMANN INTRODUCES THE OVER, THE UNDER AND THE HANGER" and Hartmann states in part, as to the hanger:

> Fisherman pack cloth just like The Over. Staggered hangers so your clothes won't crease. With hook and chain for hanging and a large heavy duty nylon zipper. Carry it either folded or long. It holds 3 suits while 3 large pockets take up to 6 shirts, 12 sets of underclothes, lots of etceteras and only a thin bulge.

It shows a woman carrying a hanger bag. (CX-4).

87. A Hartmann ad for the over (CM/CW), the under and the hanger (HM/HW) has in large type "HOW TO GET ON AND OFF A JET WITHOUT ALOT OF CHECKING, WAITING, RUSHING OR CRUSHING" AND "THE CARRY-ONS BY HARTMANN" states: "Hartmann's Carry-Ons. The first 3 pieces of luggage designed to fit . . . spaces in all new and remodeled jets." With respect to the "The Over" it states:

> Made of tough pack cloth like fishermen use, yet soft and casual. Waterproof and ZEPEL stain repellant. Shoulder strap leaves both hands free for the other pieces. Or there's a wide, comfortable handle if you insist on using your hands.

With respect to the "The Under" it states:

> Real rugged, with our famous flexible frame construction that gives when bumped and bounces right back. Hand sewn handles. Suits or dresses fold neatly. Side panels expand to jam even more clothes in.

With respect to the "The Hanger" it states:

> Fisherman pack cloth just like The Over. Staggered hangers so your clothes won't crease. Hook and chain for hanging and a large heavy

> duty nylon zipper. A choice of handles lets you carry it comfortably either folded or long. Suit yourself. It holds 3 suits or 6 dresses and the 3 large pockets take up to 6 shirts or blouses, 12 sets of underclothes, lots of etcetras and only a slight bulge.
>
> And no law says you can't carry the Carry-Ons on a bus or train in case you miss the plane.

A picture shows a man, and another picture shows a woman, carrying "The Over," "The Under" and "The Hanger." (CX-5).

87a. A Hartmann ad has in large type "The Hartmann Carry-Ons. For every piece you buy, carry off a 20% discount" and in slightly smaller type "THE CARRY-ONS BY HARTMANN." In regular type it states:

> From April 22 to May 6, 1979, you have a marvelous opportunity to get your hands on Hartmann Carry-Ons at a very considerable saving.
>
> These are the celebrated Hartmann Carry-Ons that make it possible to check nothing, to take everything. A bag for under your seat. A bag for the compartment overhead. And a hanger to hang in the closet.
>
> This functional trio - the Carry-Ons - are so light, so easy to carry on. But don't take their casual air casually. Every inch of every piece is Hartmann all the way. They're designed to fit every inch of allowable space the airlines offer you. And designed to let you take along enough for a weekend, or more than a week.
>
> Hartmann offers you the Carry-Ons in four different materials: [materials are identified] . . . .
>
> Whichever material you choose, you aren't just choosing luggage. Your are choosing Hartmann, an investment in luggage meticulously crafted to pay dividends far into the future.
>
> Carrying the Carry-Ons . . . means you'll leave the plane with all your luggage. You may never again experience the thrill of landing in Los Angeles while your bags fly merrily on to Sacramento.
>
> A last reminder . . .
>
> The Hartmann Carry-Ons. At a 20% saving . . . you can't afford to leave without them.

A picture shows a man leaving a plane with the Carry-Ons. (CX-6).

88. A Hartmann ad, "Hartmann Introduces the Shopping Bag," states in regular type:

> You'll feel more secure, too, as your Hartmann fills with valuables. Our 24 K gold finish TOUCH-O-MATIC locks are covered with a fashionable flap. Protected from bumps and international jewel thieves.
>
> In fact, this luggage is so feminine looking, we're tempted to call ourselves Hart-womann.

> Be sure you have enough room to bring back something for everyone. Pick up a matched set.

In type larger than the regular type is "Hartmann." Also the ad shows two pictures of Hartmann pieces, the larger of which has the appearance of a filled shopping bag. (CX-8).

89. A Hartmann ad, "Has Hartmann Really Gone Soft?" states:

> Yes. . And no.
>
> Yes, our Pullman is incredibly soft and giving. So soft you can overpack it and actually watch it expand. And never have to sit on it to get it to close.
>
> But no, it's not so soft that it can't stand up to the beatings and crunchings of airports, and trains, and the trunks of cars. Its uniquely constructed crushable frame just springs right back into shape.
>
> You see, what you don't see is the hard heart underneath it all.
>
> First, there's Hartmann's hard-core miracle - our resilient flexible bottom. It prevents sagging and shifting to assure your clothing comes out the way it went in - uncreased.
>
> Our soft Pullman has the strongest all-nylon zippers and stitching. The zippers will never rust, the stitching will never deteriorate, and the solid brass padlocks are more than just for show. They last.
>
> . . .
>
> Soft Pullmans comes in all the famed Hartmann covering materials . . . our famous industrial belting leather, our indestructible walnut fabric, or our 100% nylon fisherman's packcloth.
>
> . . .

The ad has a large picture of a portion of a Soft Pullman walnut fabric and small pictures of two Pullmans. In type, larger than the regular type, is the word "Hartmann." (CX-9).

90. A Hartmann ad, "The best way to sell you on Hartmann's $50 attache is to show you Hartmann's $150 attache", shows pictures of attaches and portions thereof and states in part:

> TOUCH-O-MATIC locks finished in 24 K gold, then covered by flaps to keep the case neat and the locks safe.
>
> Classic square-corner shape and soft expanding side panels offer far more carrying space than hard-sided cases of comparable size.

> Handle is sewn by hand instead of being machine-stamped. Soft, ridgeless, rugged.

Reference is also made to the TOUCH-O-MATIC locks, the interior of the cases and the materials of the two cases. (CX-10).

91. A Hartmann ad, "Which is the real Hartmann?" shows two pictures of attaches. It states in part:

> Unrivaled attention into detail goes into the making of the case on the left. For instance, its outside is sewn with extra stitches to the inch for extra strength. And its handle is handcrafted, then secured with two strong, solid brass bolts.
>
> But the case on the left is made of a leather as tough as it is rare, our exclusive belting leather. Complete with the scars and markings that makes it so distinctive.
>
> While the case on the right is made of a durable vinyl of the highest quality.

The ad which asks the question "Which, then, is the real Hartmann?" states that they both are. The ad contains the Hartmann logo and the trademarked slogan "We don't cut corners". (CX-11).

92. A Hartmann ad, "The Naked Hartmann," contains, inter alia, pictures of two attache and states in part: "Inspect the handles and you'll find that they've been shaped and sewn by our hands so they'll be comfortable in yours," "Feel the corners and you'll find them square, not round. That creates space when you need it," "Tap the sides. They're soft so they swell out while you're packing things in," "Even the locks are specially crafted for durability and protection." In large print on the ad is "Hartmann." (CX-12).

93. A Hartmann ad, "Luggage is an investment and it ought to pay a dividend," shows pictures of a Tote, Under and 26-Inch Pullman as well as a hanger shown hanging and folded. It states in part: "And why they all have

expandable side panels, the kind that let you jam in more when you need to," "And why our handles are hand-sewn to be softer, wider and with extra knuckle room," "It's [hanger] been ingeniously designed to let you carry lots more than just six dresses," and "And there's a big flap pocket for loads of extras. All without a big bulge." The ad has in large type "The Hartmann Luggage Company." (CX-13).

94. A Hartmann ad in the New Yorker shows a bag and states in large script "If this bag looks like a box, there's a good reason." In regular type it states: "You can pack much more, much more neatly into the square corners of a box which is why Hartmann is designed like a box. Except much better looking." In large type is the Hartmann logo and in smaller type the trademark slogan "We don't cut corners." (CX-14).

95. A Hartmann ad shows the corner, with handle, of a Hartmann bag and has the trademarked slogan "We don't cut corners," and the Hartmann logo. (CX-15).

96. A Hartmann ad showing a Hartmann bag opened states "Garment Center:"

> You'll be surprised how much more you can pack into Hartmann's square corners - and how neatly it all stays packed.
>
> And our classic square-cornered styling makes Hartmann the most distinctive choice for packaging, protecting and transporting garments.

It has the Hartmann logo and the trademarked slogan "we don't cut corners." (CX-16).

97. A Hartmann ad states "A hard case to make. An easy case to handle" shows a portion of a Hartmann bag with handle. It has the Hartmann logo and the trademark "We don't cut corners." It shows a portion of a Hartmann bag with handle and lock. (CX-17).

98. A Hartmann ad "Case this joint" states:

> You can bend a Hartmann but you can't break one.
> Because inside every corner there are two pieces of Wisconsin basswood ingeniously put together so they don't quite touch. We join them with a beechwood dowel reinforced by vulcanized fiber. Result unparalleled strength and flexibility.
> Which is what makes this such a high-class joint.

The ad has the Hartmann logo and the trademarked slogan "We don't cut corners." (CX-18).

99. A Hartmann ad "Others claim they use real belting leather. Hartmann has the scars to prove it" states in part:

> You hear about leather luggage that claims to be real, genuine, honest-to-goodness belting leather.
> Don't let anyone kid you. Make them show you the scars, the fat wrinkles, the insect bites that prove what they call belting leather is, in fact, belting leather. The only kind Hartmann ever uses.
> . . .
> This means if Hartmann leather gets scuffed or bruised, the scuff can be rubbed out by bringing the greases to the surface.
> . . .
> This gives it a richer surface. And since there's nothing to scratch or rub off, Hartmann belting leather actually improves as it darkens with age.
> The older an imitation gets, the worse it looks. And the worse you feel.
> So, all in all, it becomes obvious why Hartmann uses only industrial belting leather.
> Anything less wouldn't be Hartmann.

It shows a portion of a Hartmann bag and has the Hartmann logo and trademarked slogan "We don't cut corners." (CX-19).

100. A Hartmann ad, "Why Hartmann Doesn't Treat Casual Luggage Casually" shows pictures, inter alia, of the Hartmann Over and the Hartmann Hanger. It states in part:

> The Hartmann Over. Not only does the Over hold up to 25 men's or 40 women's clothing articles and accessories, it fits in the compartments over the seats in most jets. So when your trip's over, you're out Fast. Choose from two

> styles: one with three spacious pockets - each capable of holding our suitframe/hanger (included). Or if you prefer, the other has one deep, deep compartment that opens so you can pack it just like a dresser drawer.
>
> The Hartmann Hanger. You could live for two weeks on what the Hanger can hold. It features nine (Count 'em, nine) individual pockets. Most have bellows so they expand when full but lie flat as a board when empty. The Hanger has hanging space for four suits or eight dresses. There's also an optional shoulder-strap that makes the Hanger even easier to carry.

The ad has the Hartmann logo and the trademarked slogan "We don't cut corners." (CX-20).

101. An insert from Newsweek on Hartmann Luggage has pictures of Hartmann bags. It states in part:

> The jet age led to the introduction of the Hartmann International Series, a line of luggage made originally only of vinyl or fabric covering in the classic square shape, and flexible frame construction of the Skymate, plus flexible side panels for more space and packing convenience. Striving for the perfection that is the hallmark of a Hartmann product, changes and improvements followed: a specially formulated valance extrusion in 1965; handles bolted through the frame in 1967; specially molded inner corner reinforcements in 1971.
>
> Hartmann ingenuity continued with the innovative 747 Carry-On - the Over, the Under, the Hanger - the first three piece set of luggage designed to carry on the 747, the DC-10 and the L-1011. Progress culminated in a new Skymate in 1973, the distinctive Hartmann Gallery Collection, a complete range of luggage constructed on a principle of flexibility unique in the industry, with the special Slide-O-Matic and Dial-O-Matic hardware.
>
> The strong plywood sides of each case are not nailed together but sewn to a hard vulcanized fiber binding with polished nylon thread. Brass corner guards are riveted through adjoining panels to protect the case at the point of greatest stress. A tough steel valance protects the interior against dust and moisture. Delux stitched handles, riveted right through the frame, fashioned and shaped to fit the hand. A triumph of utility and beauty designed to withstand the rigors of airline travel as no other luggage ever had.

A portion of the ad shows further pictures of four men's Hartmann Carry-Ons bags. The portion states in part:

> Whether they come in belting leather, suede, fabric, or vinyl, you'll find they're brothers under the skin. These four men's Carry-Ons are just one sample of Hartmann's many styles.
> There's no rigid thinking in their insides.
>
> Bump the identical frames and they'll swell out to hold more in. There's even extra packing space in their square corners.
> . . .
> Our handles aren't ground out by machine, either. They're carefully sewn by our hands, so they're soft and comfortable for yours.
> And while those fashionable outside flaps cleverly hide our TOUCH-O-MATIC locks, every but vinyl, wears a DIAL-A-MATIC lock too. (Vinyl sports its own SLIDE-A-MATIC lock).

That portion has in large letters "Hartmann." Another portion shows pictures of various Hartmann bags and portions thereof. In large letters that portion has "The best way to sell you on Hartmann's $65 attache is to show you Hartmann's $200 attache." It states in part for the $200 and $65 attaches:

> Handcrafted by men. Not stamped out on machines. No moulded plastic parts anywhere.
> TOUCH-O-MATIC locks finished in 24-K-gold, then covered by flaps to keep the case neat and the locks safe.
> Classic square-corner shape and soft expanding side panels offer far more carrying space than hard-sided cases of comparable size.
> . . .
> Handle is sewn by hand instead of being machine-stamped. Soft, ridgeless, rugged.
> . . .
> There is a difference, of course. A big one. The $200 case is made of imported industrial belting leather.
> No two pieces of it are ever exactly alike. This leather is completely natural; no finish is needed to preserve its toughness and individuality. The case is bound in rugged rawhide and the interior is trimmed in rich gabardine with more belting leather. For unique luxury nothing surpasses it.
> Out $65 attache is made of the finest, most expensive vinyl available. And because both of these pieces are Hartmanns, the craftsmanship is the same in each case.

(CX-21).

102. A Hartmann ad (eighteenth page of CX-33) titled "Announcing ten more ways for our competition to copy us" is said to feature the overall appearances of some of the products in issue. Ms. Penix testified that the two products shown in the ad demonstrate the Hartmann products and the Hartmann look; that "It is the color, the center of the page, definitely where the eyes would go first, to the product". and that from an advertising standpoint the two products shown are the focal point. The text describes the product. Each of the ten numbered paragraphs describe a particular feature of the product. The ten features are "One Hand Handling," "Fast-Release Hook," "Non-Scratch Hook," "Longer Means Straighter," "The Open Door Zipper," "Fast Pockets," Full-Access Pockets," "Inside/Outside Pocket," "Solid Brass Rivets on Handle and Strap," and "The Carry-On Bureau." The Hartmann name is used intermittently in small type throughout the ad. Also the ad has the Hartmann logo and the trademarked slogan "We don't cut corners." (Penix Tr. at 192, 193).

103. In the opinion of Ms. Penix, part of the Hartmann look with respect to the products in issue relates to the quality and texture of the materials used themselves. The color selected would become part of the Hartmann look. In a broad-brush sense, the color, texture of the materials and the quality of the materials of the products in issue would be a part of the total Hartmann look. In some products, in issue such are more specific or dominant than other products in issue in the total look but as far as a broad-brush perspective of the Hartmann look, it would encompass the coordination of the colors, the fabrics, the fabrications. (Penix Tr. at 193 194).

104. Ms. Penix testified that "copy of the [Hartmann] ads describe the quality and the workmanship that goes into the Hartmann products." Ms.

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Penix believes that the quality is part of the ingredients that make up the Hartmann look. Quality in her opinion is synonymous with the Hartmann name. (Penix CX-24 at 10; 11; Penix Tr. at 194, 195).

105. Ms. Penix testified in deposition that the quality has nothing to do with the look but at the hearing she stated that at the deposition she was being shown a case and had referred to the quality of that case having nothing to do with the Hartmann look. Ms. Penix testified at the hearing that she should have said in deposition that quality by itself has nothing to do with the total look; that quality with other aspects of the Hartmann features certainly would have something to do with duplication of the Hartmann look; that by itself "no, it doesn't have something to do with the Hartmann look. It could be quality of a bag that is a different configuration." (Penix Tr. at 200-202).

106. Hartmann is very selective about its criteria as to whom it chooses for retail stores for product. The products are only put in stores that represent and are compatible with the Hartmann image, up-scale department and specialty stores. Hartmann has The stores selected must represent a store within a community that is regarded by their clientel as up-scale or certainly quality outlet. The store must give Hartmann front and center position. The light must be good and the staffing as good as it can be in today's retailing. (Penix Tr. at 234, 236).

107. The Executive Series was an extension of the International Series. The intent was to make sure that it was identifiable as Hartmann so that it could share in the Hartmann image. It was brought out because it was felt a need for a slicker case that did not look as much like luggage but Hartmann still wanted it to look like Hartmann. Hartmann's A4 and A9 attaches were very masculine, very luggagee-looking. In the Executive Series the

same handle and same flaps, even though they did not cover any locks, were used. The lock was in the center of the handle. The same name plate and the same materials were used but the construction of the case was different. The construction was a hard side and the interior was a little different. The valance was inside, not outside as on the International. The absence of a side-binding was an attempt to make the case slicker-looking, less luggagee-looking. (Katz SPRX-2 at 13, 14).

108. In 1970 Hartmann became aware of a trend toward lighter weight carry-on luggage. Hartmann always had a carry-on but it was a piece of luggage designed to fit under the airplane seat. The carry-on luggage that was developed in about 1970 was very lightweight-constructed where zippers were used instead of locks. In the late 1969 and early 1970's work was started on developing carry-on luggage. In 1973, the first of these products were introduced as the HM and the HW. The HM and HW were the original Hartmann hanger bags. The handle, the square shape and the trimming were similar to the International Series already developed. CX-5 is an old ad which shows the HM and HW. In addition to the hanger which was able to be hung in the airplane compartment and called the "H", the underseat carry-on, designated the "C," was developed at that time. (Katz SPRX-2 at 16; Penix CX-24 at 5).

109. In the early 1970's at the same time the hanger bag was introduced, Hartmann introduced a carry-on case as a companion to the hanger bag. That case was known as the CM/CW bag. The bag was called the Over and is shown in CX-1 as the carry-on bag. This particular style of the CM/CW bag continued in the Hartmann line until the early 1980's. (Penix CX-24 at 5, 6).

110. In late 1978 or early 1979, a refinement of the HM/HW hanger bag was made in the style called the H3. The particular differences were in

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the widening of the gusset to a three inch gusset, the splitting of the single pocket that had been on the HM/HW into double pockets on the front of the case, and the addition of the "staggered trolley system" on the interior. CPX-6 is an H3 bag in pack cloth with leather trim. (Penix CX-24 at 5).

111. The Hartmann C3 and the C2 carry-on bags are almost identical. One is maybe a couple of inches longer than the other. The CM/CW is a forerunner of the C3 and C2 bags. (Penix Tr. at 126).

112. In 1979 along with the H3 bag, Hartmann introduced the C3 carry-on style which was a three zipper carry-on bag. It was an extension or an offshoot of the CM/CW bag introduced in the early 1970's. It had a front flap and a small lock flap with the Hartmann name stamped on the outside. The C3 bag was different from the CM/CW bag in that it had three zipper compartments where the CM/CW bag was a one compartment type bag. A physical specimen of the C3 bag in pack cloth with leather trim is CPX-8. The C3 bag has had a minor zipper modification. (Penix CX-24 at 6).

113. In early 1980, the C2 carry-on bag was introduced into the Hartmann line. It is a smaller version of the C3. The C2 bag in pack cloth with leather trim is CPX-9. (Penix CX-24 at 6).

114. In 1981, Hartmann introduced another hanger bag known as the H1 which was a scaled down version of the H3 hanger bag. It was called the overnight hanger. It had a narrow width gusset, and a "single trolley". The H1 bag in pack cloth with leather trim is marked as CPX-7. (Penix CX-24 at 5).

115. Hartmann's hanger bag has two handles and actually three ways to carry it. It has a handle so that it could be carried folded, a handle so that it could be carried on a person's shoulder and a shoulder strap. The handle on the hanger bag was said to be unique because it laid flat. It was

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constructed out of a sandwich of leather. The interior of the sandwich was a very, very tough plastic material. It was wrapped again to make a covering material. The leather ones were wrapped in leather. The vinyl ones were wrapped in vinyl so that it had a grip or saddle simulating the International. (Katz SRPX-2 at 19, 20).

116. Hartmann luggage is manufactured in three plants in Tennessee. No luggage is manufactured outside of the United States. (SPRX-2 at 30; Penix CX-24 at 19).

117. Hartmann does its advertising in almost entirely national magazines and mostly up-scale magazines as The New Yorker, Vogue, Town and Country, Travel and Leisure. (SPRX-2 at 32).

118. Hartmann's advertising budget started at about percent of sales and when Katz left it was thought to be (Katz SPRX-2 at 32).

119. The Hartmann soft Pullman was developed around 1981 or 1982 and introduced in the fall of 1983. A need was felt for soft, unconstructed or less constructed packing pieces that would open with a zipper as the International opens with a lock. The Pullman was made to look like the Hartmann International - the flaps that come around the corner of the case, although they are decorative and the horizontal leather trim strip similar to what is used on the carry-on. The flaps that went around the edge do not have locks under them. (Katz SPRX-2 at 34; Penix CX-24 at 7).

120. Penix testified that it was in the fall of 1983, when Hartmann introduced its line of soft Pullmans. The soft Pullmans are in four sizes - - the 21 inch, 24 inch, 26 inch and 29 inch. CPX-10 is a soft Pullman in pack cloth with leather trim. The aesthetic elements in the International Series

such as the lock flaps, the handle and the square shape were said to be carried over into the soft Pullman. The lock flaps were adhered to the case in the soft Pullman whereas they are free and cover a lock on the International Series. (Penix CX-24 at 7).

121. The features of the soft pullman that are instantly recognizable are the handle, the lock straps, the trim strips and probably the covering material. Hartmann's belting leather is very unique. Hartmann's vinyl was a very high-quality vinyl but not unique in the same sense. No one else was using the Hartmann tweed. Also the square corners are unique. It is very difficult to make a corner square on a sewn bag and very expensive to do it but it gives more packing capacity and it looks like a Hartmann. The various pieces of matching in color trim and the zippers on the Hartmann product do not make the pullman distinguishable as Hartmann. The look of the zipper itself and the way the zipper is sewn into the bag is not unique. (Katz SPRX-2 at 68, 69, 70).

122. In addition to the A4(A3) and A9(A8) attache cases, Hartmann introduced in 1983 the E7 and E8 attache cases. The E7 is a three-inch attache and the E8 is a four-inch attache. The E7 and E8 styles kept the lock flaps and the soft handle, the square shape and the interior pocket design. The lock flaps on the E7 and E8 do not cover locks and are adhered to the case. The E7 in belting leather is CPX-11. When Ms. Penix was asked whether any of the respondents have been importing or selling the EC-7 or EC-8, she answered that we are not purporting the EC-7s and 8s are sold by any of the "knock-offs." Also none of the respondents import and sell the HM or HW hanger bag. They are only selling the H3 or H1 hanger bag. (Penix CX-24 at 7, 8) (Penix Tr. at 124, 126).

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123. With respect to a 1985 Hartmann ad, the materials make the Hartmann instantly recognized because the materials are similar to the materials that had been used in all the other Hartmann cases for 13 or 14 years. Hartmann's industrial nylon and Hartmann's industrial belting leather on the carry-on are materials that are used in that combination in almost every series. The handle on the carry-on is the same handle that was used on the predecessor bag and had been used since about 1970 or 1971. In the carry-on in the ad, there are two strips which come from the bottom for functional reasons so that they support the whole bag and do not pull out and they culminate in a saddle that is wrapped without any hardware showing as in the International bag. The saddle is fastened with hidden snaps. The strip running horizontally across the top of the carry-on and the center flap on the strip (little tab covering the lock) are considered also recognizable. (Katz SRPX-2 at 72, 73).

124. The Hartmann hanger bag in a 1985 ad, introduced in 1977 or 1978, is distinctive because of the square look, the handle in the middle of the case which is a derivative of the International handle but adapted so that it would lay flat, and the pockets which are all completely square whereas everybody else's pockets had rounded corners because it was easier. The trim strip under the handle is unique. There is a rectangular patch with an oval-stamped Hartmann or embossed Hartmann "h" logo which in 1974 or 1975 was decided to be put on every piece of luggage. These features make the hanger bag recognizable. (Katz SRPX-2 at 75, 76, 77).

125. Hartmann sells almost entirely to department stores and up-scale luggage specialty stores. When Katz retired, Hartmann had less than customers. (SRPX-2 at 40).

126. Hartmann O'Neil U. S. patent 3,161,271 shows an earlier case which had the Hartmann look. (Katz SRPX-2 at 110).

127. Hartmann C3 carry-on was introduced about the same time as the Hartmann H3 hang bag. (SRPX-2 at 145, 146).

128. CX-26 is a chart of the sales of Hartmann's A4 and A9 attache cases for 1974-1986; CX-27 is a chart of Hartmann's sales of its HM/HW, H3 and H1 hanger bags for 1984-1986; CX-28 is a chart of Hartmann's sales of its CM/CW, C3 and C2 carry on bags for 1974-1986; and CX-29 is a chart of Hartmann's sales of its soft pullman suitcases for 1983-1986. (Penix CX-24 at 8-9).

129. The Hartmann that Wanamakers would have had on its floor could have been shipped with a little guarantee booklet hang tag and the suggested retail price tag which were supposed to be left on the case. (Katz SRPX-2 at 161).

130. All of the leather on the exterior of CPX-3 is made from belting leather which is imported. All of Hartmann raw materials are purchased within the United States with the exception of the belting leather. Belting leather represents of all of the raw materials purchased for all the product lines. (Penix Tr. 141, 142).

131.

(Penix Tr. at 151, 152).

132. By 1984 Ms. Penix started to see some Hartmann "look-alikes" appearing in the market place.

In 1985 a look-alike soft Pullman case was discovered in one of Hartmann's specialty dealers. The look-alike case was identified as being distributed through another Hartmann dealer, Weiners of California and was being offered along with copies of the Hartmann hanger bag and one size in the Hartmann carry-on. (Penix CX-24 at 13, 14).

133. A suit was brought against Weiners by Hartmann following the submission of a letter by Hartmann to Weiners. (CX-38).

" A Consent Judgment was entered on December 16, 1985 in the suit against Weiners. (CX-39). (Penix CX-24 at 14, 15).

134. In September 1985 Hartmann expressed its concern to the Samsonite Corporation for its marketing of Hartmann look-alikes in the H1, H3, C1 and C3 styles. Their products are shown in ads. (CX-40). After correspondence, an agreement was reached

"

(CX-41). (Penix CX-24 at 15).

135. In August-September, 1985 Hartmann became aware of copies of the Hartmann A4 attache case being sold by the J. C. Penny Company and

Halston. CPX-12 is a sample of the case purchased from J. C. Penny. Hartmann determined that the case was manufactured by Seward and suit was brought against Seward Luggage, J.C. Penny Company and Halston Enterprised, Inc. Halston and J.C. Penny Company agreed to a settlement and admitted Hartmann's proprietary rights in its trade dress. (CX-42). After full trial and just before decision, Seward Luggage Company entered into a judgement and permanent injunction on November 12, 1985 agreeing not to produce any attache cases which are confusingly similar to the overall trade dress of any item that utilizes the Hartmann Look. (CX-43). (Penix CX-24 at 15, 16).

136. The look-alikes involved in this investigation, such as attaches, the carry-ons, the hanger bags and the soft Pullmans which Ms. Penix has personally examined appear to be of lesser quality than any Hartmann in both materials and in workmanship. (Penix CX-24 at 16, 17).

137. In November 1985, Hartmann received a letter from with a hanger bag being returned. (CX-44). The letter stated in part:

> The first time the bag was used, the teeth on the plastic hangers that secure them to the metal bars broke and it was all downhill after that. The third time the bag was used, the zipper on the large external compartment came completely off. I was going to cite a litany of all of the bag's ills but suffice it to say, the bag is torn and broken and of no further use to me. Please note - at no time was this bag overloaded or otherwise abused by me - as I said, I was thrilled to receive it and have taken very good case of it. The only conclusions I can reach are that (1) the bag was defective or (2) Hartmann luggage does not deserve its prices or its reputation.

The bag submitted by is CPX-13. The bag is not a Hartmann bag. The bag is in a state of severe disrepair. The bag is said to look like a Hartmann hanger bag to the same extent that the copies involved in this investigation look like the Hartmann H3 bag. When CPX-13 came back to

Hartmann it had the Hartmann tag on it. Ms. Penix recalls that the gentleman received CPX-13 as a gift and it had the tag on it which led the gentleman to believe CPX-13 was a Hartmann case. (Penix CX-24 at 17, 18; CX-44, CX-45; Penix Tr. at 99).

138. Each luggage piece, when it is packed at the finishing station, has a tag on it that in essence has the warranty and any other pertinent information regarding that piece of luggage. It is referred to as a hang tag (Penix Tr. at 80).

139. A luggage made by Hartmann, viz. CPX-1, carries the Hartmann name in more than one place. The name appears on the top change lock underneath the center of the handle. It also appears on the side patch, embossed in the leather gusset trim. It further appears on the three hinges at the rear of the case. In all probability the Hartmann name appears on the inside of the case. There is a name tag for the consumer to write his name on and the tag has Hartmann luggage. When the bag is opened, there is exposed a booklet which was inside the case on a piece of string that goes around the handle which is a string tag or hang tag and has the warranty on the front of it. The booklet carries the Hartmann name on the cover and on the back page and intermittently throughout the piece there is reference to Hartmann. Traditionally there are three hang tags that go out on a Hartmann piece, viz. the booklet which contained the warranty and a description of some other Hartmann pieces, the second tag which is a story of belting leather with a small patch of leather also on a string loop and the third tag which is the suggested retail price ticket. The Hartmann name is on the suggested retail price ticket. The belting leather tag carries the Hartmann name. (Penix Tr. at 81, 82, 83).

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140. The way that a Hartmann bag is shipped is that the three tags are placed on the bag, the bag is placed in a polyethylene bag for protection and then put inside a box for shipment. Each piece is shipped individually in its own carton. The outer box carries the Hartmann name. The Hartmann logo probably appears on both sides of the shipping box. The logo is on all three tags on the case. In most instances "Hartmann Luggage" is displayed on all cartons in the same manner in bold display. (Penix Tr. at 84, 85).

141. On CPX-1 there is a small leather patch sewn onto the upper right corner of one of the large sider wherein there is an "h" in an oval. This is a Hartmann trademark and it is widely used on all Hartmann products. The "h" in the oval is advertised. Hartmann, a brand name, is advertised when the luggage is advertised. (Penix Tr. at 88).

142.

(Penix Tr. at 94, 95).

143.

(Penix Tr. at 95, 96).

144. CPX-17, identified as Ivey's attache case from Starco, has "some of the Hartmann look" i.e. lock straps that come around and emanate from the figure-eight handle, coming over the sides and snapping down to cover locks, even though the locks perhaps are not the same locks. The lock straps emanate from the figure-eight handle coming up to form an arc with a saddle through the middle with the stitching and the two rivets on the top being closely related. Also there is the square look and even the fabrication in CPX-17 is relevant. While CPX-17 material may not be of the same quality of material as in Hartmann CPX-5, there is an attempt to be very close to the Hartmann attache. (Penix Tr. at 280, 281, 282).

145. The CPX-12 attache, identified by Hartmann as a Seward bag, incorporates that Hartmann look with the square shape, the dominant features being the lock straps coming out from the figure-eight handle loop, forming an arc with a saddle on it with rivets and a stitch line on top. There is also a patch. (Penix Tr. at 283, 284).

146. Comparing CPX-27 which is a leather version of a K mart attache and the Hartmann CPX-2 attache, the K mart attache has some of the "dominant features that I referred to earlier, the dominant features being the lock straps that cover the lock, come over the sides, come down and snap on the side, have a figure-eight handle that comes up into an arch and a saddle that goes around that figure-eight handle and is stitched and is riveted, has a square shape." (Penix Tr. at 308).

147. CPX-10 is a Hartmann soft pullman in Hartmann's casual collection. CPX-1 is a Hartmann International in walnut tweed. Looking at the side version of those two cases, one would readily see the carry over from the International. Those dominant features carried over and into the soft

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pullman case (CPX-1) are the lock straps adhered to the case and which go around the figure-eight loop, the figure-eight loop doing the same thing on CPX-10 that it does on the International and on the attaches, i.e. it comes up, forms and arch and the saddle goes around it and is stitched and riveted. There is also a square shape. Both of CPX-1 and CPX-10 are part of the Hartmann look.

148. CPX-24, a soft Pullman from Weiners Luggage produced by Pungkook Company, has a front dimension which shows some of the trim strip to be the same but the more dominant features again being the straps that emanate from the handles, come over the sides for no apparent reason and are locked down to the case the same as Hartmann's are. The figure-eight handle loop comes up and forms an arch and the saddle is put on and stitched across the top maybe with a little less leather showing but the two rivets are there. The same type of handle is put on CPX-24 as found in Hartmann's bag. (Penix Tr. 311, 312).

149. CPX-9 is a Hartmann carry-on C2 style made in the 4400 series which could be coffee pack cloth trimmed with belting leather. The most dominant feature on CPX-9, aside from the total overall look, would be the trim strip across the middle, the strip going across with the tab in the front that has the Hartmann logo. Ms. Penix testified that there are others "but feel those are the predominant ones." CPX-9 is a C2 carry-on bag. (Penix 313, 314).

150. CPX-8 is a Hartmann carry-on C3 style bag in the 4400 series which is a coffee pack cloth trimmed with belting leather. CPX-9 is an inch bigger than CPX-8. CPX-8 has the predominant features of the CPX-9. (Penix Tr. at 314).

151. When asked whether the dominant features are different in the Hartmann CPX-9 carry-on and the Hartmann attache and whether in CPX-9 there is the lock strap from the figure-eight handle and the saddle wrap around, Ms. Penix answered "No;" that to the extent that it was possible that the same look be carried over into other bags but where the bags do not have a lock for the lock flaps to cover "then we tried to incorporate a Hartmann look into that. That is the reason thus when we say a total Hartmann look, it is very difficult." On CPX-5 or CPX-3 attaches there is no strip across the center. When asked whether one has to look at different features with respect to the particular piece that is talked about, i.e. whether it is the carry-on or whether it has at least what Ms. Penix was saying are the dominant features, or whether it is an attache case, etc., Ms. Penix answered "That is my testimony, absolutely." (Penix Tr. at 315-317).

152. The bag, CPX-22, which has been identified as a carry-on bag from Kluge (Kingport), has some of those dominant Hartmann features that are described in the C3 style, "the center, that strip going across the case and the tab in the middle, although it does not have the Hartmann luggage monogram on it or logo on it, it certainly has a tab in that same position." (Penix Tr. at 317).

153. The CPX-23, identified as an American Guard-It carry on bag, carries the same Hartmann dominant features as on the Hartmann carry-on C3 and C2 styles, the center strip and the tab in the center. The Montgomery Ward carry-on (CPX-29) carries the same dominant features, viz. the center strip and the tab. CPX-29 also has a patch for no apparent reason. Hartmann puts the "h" logo on the patch. (Penix Tr. at 319).

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154. The carry-ons CM and CW were the forerunners of the C2 and the C3 carry-on bags. From the date of the birth of the CM and CW there was a strip across and the tab in the center. (Penix Tr. at 319).

155. CPX-6 is a H3 Hartmann hang bag in coffee pack cloth trimmed in leather. It has some dominant features as the center strip across the middle to which the handle is attached and the handle in this bag is made to simulate the handle that is on the original International attache case. The handle on CPX-6 is in a flattened figure-eight with a saddle in the middle zone and riveted or adhered to the case with shortened lock straps (shortened in a sense that they come back over the handle and are adhered to the center board). Other features, dominant or not, which are considered part of the Hartmann look associated with the H3 hanger bag (CPX-6) is the case itself, the square shape, square meaning the pockets are square and the square design of the case when it is folded. CPX-6 has two flaps and that is a dominant feature of that style. The most dominant features are the handle, center board and the square shape. The pockets are an important feature in the bag because the pockets were designed to give a very unique look in the marketplace. The two tabs hanging down in the front look like buckles and are buckles in a sense. However if one punches underneath the buckle, the real release is the quick release snap underneath the buckle and the buckle remains purely aesthetically as a design. The quick release snap is intended for quick release and entry into the pocket. In reality there is no reason for the buckle to be there except for design features. The dominant features of the hang bag are not the same as the dominant features of the carry-on bag. The carry-on bag does not have the square pockets or the buckle effect. The

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figure-eight is not on the carry-on. The dominant features hence can vary from product to product. In the H3 hanger bag, the dominant features are the center handle, the flattened figure-eight handle on top, the loops through the handles and then the design feature of the double pockets with a quick release snap. (Penix Tr. at 319, 320, 321).

156. The CPX-20 is a Montgomery Ward hanger bag. The dominant features of the Hartmann look shown in CPX-20 are the center board with the flat figure-eight handle with the little loops coming out to simulate the lock flaps, the shortened lock flap, the double pockets with the two tabs on them, the little patch in the upper right-hand corner for no reason at all. (Penix Tr. at 322, 323).

157. The dominant features of the Hartmann look in an American Guard-It CPX-21 hanger bag are the flat figure-eight handle with the saddle on it with a loop going through it with the two pockets and front buckles. The little patch is not there. (Penix Tr. at 323).

158. CPX-35, identified as a Kluge bag, has the center board, the flat figure-eight handle, the saddle through it, the two loops coming out to simulate the lock straps, the double pockets, although they might not be squared off as the Hartmann pockets are, the flaps which are squared off which simulate the pocket and the buckles on the front of the pockets. (Penix Tr. at 324).

159. Ms. Penix has seen a Hartmann displayed on the floor of a store with the three tags on them. (Penix Tr. at 328).

160. All of the Hartmann advertising that is placed by the Hartmann Luggage Company carries the Hartmann name. (Penix Tr. at 331).

161. The dominant features in the look of the Hartmann attache CPX-3 are the lock flaps, figure-eight handle, the saddle over the handle, stitching and the double rivets on the top with the stitched saddle going across, the square shape. The total look is very difficult to explain until you start to zero in on the dominant features. The features that are not dominant are the drop-in panel or the two side panels that are put in in a dropped-in method, the thread used in the stitching process, the way the thread is slanted, the use of the feet on a case. (Penix Tr. at 333, 334).

162. The Hartmann look is the overall appearance of the case and "everything that goes behind that to create that look, whether it be the advertising, the quality," all of those ingredients are the total Hartmann look. Quality is part of the Hartmann look. (Penix Tr. at 334, 335).

163. In Hartmann attache CPX-3, the saddle on the handle is part of the aesthetics but it does provide cushion and brings the two loops together. The lock strap covers the lock. (Penix Tr. 338, 339).

164. Hartmann has many trademarks that make up the total look of the Hartmann case. The name is one and the patch on the front is another. (Penix Tr. at 343).

165. The dominant features of the Hartmann look in a Hartmann H1 hang bag (CPX-7) are the center strip, the flattened figure-eight handle and the loop going over to form the simulated lock flaps. The square shape is of lesser dominance but definitely part of it. The H1 does not have the flaps coming over because it is a thinner bag which does not lend itself to the front flaps but it is squared off and trimmed in the same manner as an H3. The front piece is missing from H1. Lesser features that would make it a Hartmann bag are the square shape, the binding and the way it is done on the ends, and the stitching. The quality would be a lesser feature but does make

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up the total look. (Penix Tr. at 357, 368).

166. The fabrics used, the letters used, the textures of the fabric, the colorations all contribute to the Hartmann look of the Hartmann luggage types in a broad-brush sense. For most of the Hartmann lines there will be basically four or five fabrications: belting leather, pack cloth trimmed with belting leather, walnut tweed trimmed with belting leather or pack cloth, coffee pack cloth trimmed with peanut butter or camel vinyl. These fabrications carry through on all of the bags in the Hartmann line. They are all related or can be matched together. (Penix Tr. at 360, 361).

167. The carry-on C was the forerunner of the carry-on CM or CW shown on the bottom of CX-4 and CX-5. The CM and the CW are the same as the C. The CM and CW are part of the Hartmann look. The CM and CW were the forerunner of the C3 and C2 bags. (Penix Tr at 361, 362).

168. Robert Davis was employed by Hartmann from July 1968 to July 1985. In 1974 he became director of Research and Development and New Products and had responsibility for the design of luggage products. In 1981 he became Vice President of Design and Product Development. After leaving Hartmann in July 1985, he became a consultant in the luggage field. He set up his own business called Arbone Luggage in about January 1986. Arbone currently manufacturers a complete line of luggage. He was responsible for designing the Hartmann luggage bags, carry-on bags and soft pullman suitcases in issue. (R. Davis CX-79 at 1, 2, 3).

169. Robert Davis was qualified as an event witness and also an expert for complainant in the design, manufacture and quality of luggage products. (R. Davis Tr. at 563).

170. The overall appearance of the Hartmann attache case has remained unchanged for at least the 17 years of Robert Davis' employment with

Hartmann. The appearance of the Hartmann attache case as Davis has known it since the date of his employment is the same as CPX-2. Although Davis was for many years involved in redesigning and designing different items of luggage for Hartmann, during Davis' employment, the only changes which Davis had made to the Hartmann attache case was to add a center lock, modify the interior and improve the construction of the case. These were said to be improvements to the quality of the product but were said not to change the appearance. (R. Davis CX-79 at 3).

171. The overall appearance of an attache case, which Davis testified is instantly recognized as Hartmann, is a combination of all of the features of the case but not limited to any particular feature. These features include the handle, the lock flaps ("the lock covered up by a lock flap - if you raise the lock flap up there is a recessed lock and it opens and is a touch-close lock because it is advertised that all one has to do is lay one's hands on top of the case and it closes automatically - it is "not something that would grab you as you walk by it on a shelf, because naturally you can't see it"), the riveted saddle, the concealed locks, the valance, the prominent window frame binding, the drop-in panel construction, the square corners, the prominent name identification (the name Hartmann on the bag which is at the patch with the four rivets where there is a Hartmann logo embossed on the tip, and with some attaches it is also on the lock) and the hinges. The look of the hardware, the fact that it is metal and the fact that it is substantial hardware are parts also of the instantly recognizable feature. The manner in which all of the features, including unmentioned components, are combined and used is what creates the overall appearance of the product. Using any one or two of the features alone would not necessarily be construed

as a copy of the Hartmann product. However a combination of these features used in such a way that a consumer might confuse the product as being a Hartmann would amount to a copy of the Hartmann product. If one takes a lock flap and puts it on the panel of the case and puts the handle on the end and does not put rivets in the handle and then takes the binding and wraps it around the case in a certain way and puts hinges up on top, it may not be recognizable as a Hartmann attache but if they are assembled in a manner as the Hartmann attache is, they are recognized as a Hartmann. To a certain degree the stitching and the color coordination of the thread to the material should be included in the overall look. The color of the Hartmann attache, certainly the walnut fabric, the walnut tweeds with the leather trim (CPX-33) is unique to Hartmann and is instantly recognizable. The walnut tweed product has been at Hartmann for at least 20 years and is recognizable as Hartmann just as much as the fabric and the trim is recognizable as Hartmann as are the lock straps. The color of the walnut fabric is very unique. R. Davis would add walnut tweed to the list of features to be included in the overall look. (R. Davis. Tr. at 622). The Hartmann leather is not recognizable because a Hartmann belting leather attache can go from a very dark brown to a very light brown because it is natural leather. No two hides are ever the same color. The general tone or feel however of a Hartmann attache is unique. The quality of the product relates to the type of materials, the type of research done on the product. Quality is built into a Hartmann. One can distinguish something that is quality or made with quality most of the time as opposed to something that has not been made with quality. There is a point where it is very difficult to distinguish which is the better quality. (R. Davis CX-79 at 4; R. Davis Tr. 613-622).

172. In designing certain other brief cases to be added to the Hartmann line R. Davis attempted to keep the same overall appearance created by the Hartmann attaches case. For instance, prior to his leaving Hartmann he designed three-inch and a four-inch framed attache cases called EC7 and EC8 which employ the same saddle handle and the lock flaps in order to maintain a similarity of appearance to the Hartmann attache case although the case also has a more modern look to it. The EC7 is CPX-4. (R. Davis CX-79 at 6).

173. The hanger up bag as was originally introduced by Hartmann had the following similar features to the Hartmann hang up bag H3:

(a) a flattened version of the figure eight saddle handle used on the International Series formed by a double-stitched line of layers of leather in a figure eight shape with a stitched band over the middle and secured to the bag by a shortened version of the Hartmann lock flap running through the loops on the handle and secured by rivets to the bag;

(b) wide prominent trim strips across the width of the center of the bag and across the width at the top of the bag formed of stitched leather;

(c) color coordination with leather or simulated leather binding, straps, welting and piping as well as with prominent zippers also color coordinated to provide a Hartmann appearance;

(d) the marine style hook for hanging the bag and other marine style hardware;

(e) the top handle design with a flattened leather look; and;

(f) double buckles at the center of the lower pocket with a flap.

(R. Davis CX-79 at 7-8).

174. The original hanger bags introduced in 1973 by Hartmann were introduced as the HM and the HW. (Penix CX-24 at 4).

175. The original hanger bags introduced by Hartmann had also the following features which were changed in subsequent versions.

(g) a tapered gusset at the side of the bag; and

(h) a diagonal zipper on the back of the bag.

176. In about 1977/78, R. Davis designed the hanger up bag (H3). (CPX-6). He did this by adding a top pocket to the front of the bag and making the bottom pocket into dual pockets with dual flaps having the prior leather binding and dual buckles. By this time Hartmann had also added to the hanger bag a rectangular leather label with the Hartmann "h" design on it. In 1982/83 he made a few other changes to the Hartmann hanger bag, such as changing the top pocket to allow zipper access at the side or top of the pocket, modifying the closure of the bag and adding individual snaps hidden under the buckles on the dual bottom pockets. Although the pocket closures were changed from buckles to snaps, the snaps were concealed under the existing buckle straps. (R. Davis CX-79 at 8, 9).

177. With the exception of walnut tweed, color would be left out of the description of the overall recognizable Hartmann look. However what is being talked about here is only leaving color out of the fabric color. (R. Davis Tr. at 624, 625).

178. To Davis' knowledge, except for the copies which Hartmann is pursuing, the numerous competitive hanger bags have not imitated the overall look of Hartmnann's hang up bag "including the unique flat figure eight saddle handle, the dual bottom pockets with dual leather buckles and leather binding, the marine-look hardware and the prominent trim straps." (R. Davis CX-79 at 9).

179. In 1973 R. Davis designed the Hartmann carry-on with a flap opening on the side of the bag with the flap having a leather trim and a separate over stitched lock cover at the center of the trim. This bag is shown as the carry-on on CX-6. In designing the Hartmann carry-on in 1973, Davis used the stitched leather straps with the saddle handle and the flap with prominent leather trim and a stitched lock cover. Also used was a color combination between the welting, piping, trim, leather covers and zippers on the bag. The overall facial look was square. (R. Davis CX-79 at 9, 10).

180. In 1978 R. Davis designed the Hartmann carry-on bag (C3) which was a three-compartment carry-on bag (CPX-8). For purposes of continuing the Hartmann look, maintained were the stitched leather straps with the saddle handle, the flap with the prominent trim on the flap and the lock cover. Also employed was the color coordinated zippers to coordinate with the piping, trim and straps for the case. Davis subsequently designed the C2 carry-on, a smaller version of the C3 for the Hartmann line in 1980. (CPX-9). (R. Davis CX-79 at 10; R. Davis at 626).

181. In 1983, R. Davis designed the soft, casual pullman bags sold by Hartmann (CPX-10). In designing this luggage he used features as the saddle handle, trimming and lock flaps. (R. Davis CX-79 at 11).

182. To a certain degree, color has become an instantly recognizable appearance of the carry on and soft pullman Hartmann bag. If one is shown an olive type khaki color pullman which has been running since 1970 people associate this color with Hartmann. The design is however much more stronger as a feature than the coloration. R. Davis would leave color out of his description of what is overall recognizable as Hartmann with the exception of the walnut tweed fabric. However only the color is intended here. The

color coordination between the zippers and trims on a fabric has a lot to do with the Hartmann look. (R. Davis Tr. 622-625).

183. Color coordination between the welting, piping, trim, leather covers and zippers on the bag is part of the instantly recognizable appearance of the Hartmann carry-on and the Hartmann hanger bag. (R. Davis Tr. at 626).

184. The most important parts of the Hartmann look as to attaches are the handle, lock straps, the valance and the binding. (R. Davis Tr. at 630).

185. R. Davis compared a copy of Hartmann A4 attache case to a genuine Hartmann A4 attache case in terms of quality. The product which he compared was an attache case with a price tag from Ivey's marked CPX-17. The case is stitched with a spun core polythread as opposed to Hartmann's nylon thread. The stitching in CPX-17 is much weaker. The covering of the case is a nylon and poly combination as opposed to a 100 percent nylon covering in the Hartmann A4 attache case. The trim in CPX-17 is vinyl as opposed to leather in the Hartmann case. The stitching around the outside is much longer which leaves a weaker stitch. The snaps and rivets on CPX-17 are of a much lower grade than the Hartmann hardware. The handle attachment is riveted onto the case as opposed to being bolted on the Hartmann case, which is much weaker than the Hartmann case. The stitching on the binding of the case is uneven. The binding on the outside is not welded together but is just lapped and seamed over. The locks on CPX-17 are plastic as opposed to metal on the Hartmann case. The valance filler is a latex impregnated fiber board as opposed to a copolymer extrusion for the Hartmann case. It is a weaker and less resilient so that if the valance takes a blow, it will deteriorate over a short period of time. The box of CPX-17 is constructed from a polyvinyl

chloride polymer frame as opposed to the basewood frame with the fiber reinforcements on the Hartmann case. The box on CPX-17 is weaker in the corners than the Hartmann box. The stays are of lower quality than Hartmann's stays. The rivet attachments on the hinges which go through the polyvinyl chloride honeycomb box are not as good as riveted attachments through a wooden box. The rivets on the hinges of CPX-17 pull out rather easily. The strikers for the lock assembly are metal as the Hartmann strikers are but they are not case hardened strikers as are the Hartmann strikers and can be easily bent with one's fingers. The Hartmann strikers cannot be so bent. The interior components of CPX-17 are poorly executed. The quality of CPX-17 is well below the quality of the Hartmann attache case. (R. Davis CX-79 at 13, 14).

186. According to R. Davis, the consumer recognizes the Hartmann look in an attache as an attache that has lock flaps and a handle on top, a figure-eight handle and a square. The garment bag which R. Davis designed in 1978 became famous for its saddle pockets on the outside with the square flaps and the center handle and the wide, prominent trim that goes across the center handle. Also according to Davis, all the Hartmann products are made with quality materials and with the heavy stitching and marine type hardware. When R. Davis developed the C3 carry-on (CPX-8) he tried to transpose the same lock with the square flaps and the binding trims and the outlining of the panels and the actual covering of the lock flap into the C3. (R. Davis Tr. at 651, 652).

187. The Hartmann pullman includes the trim strip across the side, the zippers either along the side gussets or top panel, the dominant features being the figure-eight handle, the saddle, the rivets in the saddle, the

simulated lock straps, the rivets on the side and the square look. (R. Davis Tr. at 653).

188. CPX-7 (H1) hanger bag has some of the same look as the CPX-6 (H2) hang bag. Both have a U-shaped zipper, both have a flap that comes out over the top and snaps down. The H1 does not have the two offset pockets on the back but both front sides have the figure eight handle with the saddle and the rivets. They have the handle loops that come through which looks like a lock strap They have the same shoulder strap. They have the binding. If the bags are folded in half, they have a square look. They have the same type of marine type hardware plus the "h" logo. (R. Davis Tr. at 657).

189. One of the reasons why consumers identify pieces as Hartmann is because one can buy companion or matching pieces. (Davis Tr. at 658).

190. Belting leather and walnut tweed are instantly recognizable as Hartmann. (R. Davis Tr. at 658, 659, 661).

191. The most important features of the Hartmann H3 (CPX-6) hanger bag are the figure eight handle including the saddle and the rivets in the saddle and the fashion in which the handle is attached to the case with the lock type flap and the dual flaps with the center buckle straps. (R. Davis Tr. at 662, 663, 664).

192. CPX-20 Montgomery Ward hanger bag has the same important features described for CPX-6, viz. the flaps, the handle, the middle trim, the trim board, the way the handle is attached to the board with the loops through it, the buckles on the flaps, the binding around the flaps. American Guard-It CPX-21 also has the center handle, the handle loops that fasten the handle to the bag, the trim underneath the handle, the flaps with the square look, the binding around the flaps, the color coordinated zippers on the flaps and the

buckles and attachments. (R. Davis Tr. at 672, 673).

193. The most important factors of the Hartmann CPX-3 carry-on are the square flap with the trim that goes across the flap horizontally and the lock flap. (R. Davis Tr. at 674).

194. CPX-22, identified as a carry-on bag from Kluge, has the square flap, the horizontal trim strip, the lock flap that covers up the lock and the handles although the handles are of a different type and the saddle is of a different type. (R. Davis Tr. at 674).

195. The American Guard-It CPX-23 has also the square flap, the lock flap or the lock strap that covers up the lock and that goes on the center of the case. The handle is made very, very similar to Hartmann and the saddle is made identical to Hartmann. It also has the horizontal trim strip. (R. Davis Tr. at 675).

196. Montgomery Ward CPX-29 carry-on has the square flap, the flap trim that goes across the flap, a lock cover, the exact same handles but a different saddle, and an "h" logo patch on the case. (R. Davis Tr. at 676).

197. R. Davis is of the opinion that any carry-on bag that has the square flap, the trim strip across and the lock flap that covers up the lock in the center is an infringement of the Hartmann look even if it is in the shape of a woman's hat box. (R. Davis Tr. at 677, 678).

198. The important features of the Hartmann attache CPX-33 are the square look (in contrast to what was said about the carry-on bag), the lock straps and the handles with the saddle and rivets. (R. Davis Tr. at 679, 680).

199. Hartmann CPX-2 A4 belting leather attache case has the handle, lock flaps and square look. The Hartmann EC7 attache has the handle, lock straps, the square look and a combination lock in the center under the

handle. (CPX-11). There are no locks under the lock straps. The lock straps are merely decorative. The combination lock is not part of the Hartmann look. (R. Davis Tr. at 682, 683, 684).

200. With respect to the Hartmann soft pullman the Hartmann look is in the handle with the saddle and the rivets, the screws that go through the hardware, the phony lock strap, the rivet on the side and the square look. (R. Davis Tr. at 684).

201. CPX-17 attache includes the Hartmann look because it has the lock flaps, the same handle with the saddle and the rivets and it has a square look. R. Davis could have a problem distinguishing Hartmann CPX-33 and CPX-17. They both have working lock straps, i.e. they serve a purpose in that they conceal locks. (R. Davis Tr. at 685).

202. Hartmann CPX-1, a walnut International case, was designed with lock straps to conceal most of the hardware and be clean looking and also to protect the locks. (R. Davis Tr. at 686).

203. CPX-43, identified as a vinyl attache from Iveys, utilizes the Hartmann look. It has lock straps, the figure-eight handle with the saddle and rivets and it has a square look. The K mart CPX-27 attache includes the Hartmann look because of the figure-eight handle with the lock strap, the saddle with the rivets in it, the square look and because of the way the lock straps are attached to the handle. Also the K mart CPX-31 incorporates the the Hartmann look because it includes the figure-eight handle, the saddle around the figure-eight handle with the rivets, the lock-straps, the square look and also because of the manner in which the lock straps are attached to the handle. The CPX-12 identified as a Seward Starco also incorporates the Hartmann look because of the square look, the figure-eight handle, the saddle

with the rivets wrapped around the figure-eight handle, the lock straps, and the manner in which the lock straps are attached to the handle. (R. Davis Tr. at 689, 690).

204. Attaches are not ordinarily offered for sale with a cardboard sleeve. (R. Davis Tr. at 695).

205. According to R. Davis, an attache without the figure-8 handle, lock flaps and with rounded corners but in walnut tweed is not a copy. (R. Davis Tr. at 704, 705).

206. A Hartmann attache can cost something like $175. R. Davis is of the opinion that when retail purchasers are purchasing attaches at that price they look at them. A prospective purchaser he would see the H in the oval on the Hartmann case and the Hartmann name on the hinges if the attache is picked up. Also it would be expected that the purchaser would look inside and see the Hartmann Luggage tag sewn in the inside. (R. Davis Tr. at 705, 706).

207. A K mart attache case (CPX-18) is stitched with a spun core polythread as opposed to Hartmann's nylon thread. The stitching in CPX-18 is much weaker. The covering of CPX-18 is a nylon combination as opposed to a 100 percent nylon covering in the Hartmann case. The stitching around the outside is much longer which leaves a weaker stitch. The hinge is not as substantial a hinge as the hinge on the Hartmann case. The box of the K mart case (CPX-18) is constructed from a polyvinyl chloride frame as opposed to the basswood frame with the fiber corner reinforcements on the Hartmann case. The box is weaker in the corners than the Hartmann box. The stays are of a lower quality than the Hartmann stays. The rivet attachments on the hinges, which go through the polyvinyl chloride honeycomb box, are not as good as rivet attachments through a wooden box. The rivets on the hinges of K mart CPX-18

pull out rather easily. The strikers for the lock assembly are metal as the Hartmann strikers are but they are not case hardened strikers as the Hartmann strikes are and can be easily bent with a person's while fingers the Hartmann strikers cannot be so bent. The overall workmanship on the interior of the K mart case is poor. The inside valance is a piece of cardboard covered with leather which with any type of pressure would break. CPX-18 uses cardboard backers on pockets which is less resilient and also cheaper than the materials which Hartmann uses for its pockets. K mart CPX-18 is of lower quality than the Hartmann A4 attache case. (R. Davis CX-79 at 14, 15).

208. With respect to CPX-19, a hanger bag from St. Ives which R. Davis tested when he was at Hartmann, the outer fabric has no urethane back coating which protects the contents against moisture and also keeps moisture in the pockets. It also keeps the edges of the fabric from fraying. Hartmann's hanger bag has a urethane coating on its fabric. The fabric in CPX-19 is of a lower pick than Hartmann's which means that the Hartmann fabric has more thread per square inch than the fabric of CPX-19. CPX-19 would be less abrasion resistant and puncture proof and the seams have less strength. The vinyl on CPX-19 which is on most trim parts is an inferior vinyl to the Hartmann vinyl. The vinyl has no clear vinyl cover so that when the vinyl is subjected to wearing it will cause discoloring. This is said to be in contrast to the Hartmann vinyl which has 3-4 mils of vinyl cover. The handle attachments and the D-ring attachments on CPX-19 are of a flimsy metal clip and small headed non-substantial rivets as opposed to the screws and T-nuts used on a Hartmann case. These were said to be more easily pulled out. The middle and top support boards in CPX-19 are a very light weight metal extrusion which upon the least amount of pressure can be bent and will stay

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bent and not return to their original form. The lower straps on the buckles are vinyl on vinyl which can be torn very easily. The hardware is inferior. Some hardware is metal stamped hardware as opposed to cast hardware. Some of the parts such as the hook can be bent easily and are not case hardened as the Hartmann parts are. The material selection on CPX-19 is very poor and the workmanship is fair. This renders CPX-19 a very poor quality hanger bag. (R. Davis CX-79 at 15, 16).

209. A hanger bag (CPX-20), which bears a tag from Montgomery Ward, has no urethane coating on the back of the fabric. The vinyl has no clear vinyl on top of it. Mr. Davis has the same comments for the quality of the rivets, attachments and hardware as he made for CPX-19. He also saw the same problem with the pick of the fabric and the seam strength as for CPX-19. The hardware on CPX-20 is a little more substantial than on CPX-19. The handle boards are also harder but if bent, they will not bounce back to their original shape. The workmanship on CPX-20 is very poor and the bag has very poor materials. (R. Davis RX-79 at 16, 17).

210. A hanger bag with a tag from American Guard-It (CPX-21) is a very poor quality hanger bag. Mr. Davis has the same reaction toward CPX-21 as he did for CPX-20. (R. Davis CX-79 at 17).

211. A copy (CPX-13) of a Hartmann hanger bag was broken at the top handle because the handle loop used a polyethylene as opposed to the polypropylene used for the Hartmann hanger bag. The polyethylene causes a weaker handle more subject to breaking. The fabric does not have a urethane coating. Also the stitching has pulled out from the side gusset because there was no urethane coating to lock the fibers together and because a spun core polyester thread for the stitching was weaker than the nylon thread for the

Hartmann bag. There were also different spots on CPX-13 where the vinyl had discolored or rubbed off entirely because it did not have clear vinyl on top of the printed vinyl as did the Hartmann hanger bag. There are also instances where a D ring has pulled off of the case and where the strap is poor where it hooks into the buckle in the bottom of the case. The handle board is a very flimsy piece of metal which can be bent and broken. R. Davis' conclusion is that the copy is a very low-quality bag both in materials and in workmanship which was made to look like the Hartmann H3. (R. Davis at CX-79 at 17, 18).

212. Comparing the quality of a carry-on bag marked with a hang tag from with the quality of the Hartmann C3 carry-on bag, the fabric does not have the pick of the Hartmann C3 carry-on bag. The fabric does not have the quality of the Hartmann C3 carry-on bag. The gliders are not set into polypropylene or support materials and hence they can be easily torn off. The slighest amount of pressure causes the gliders to come off. There is no spring wire in the edge of CPX-22 such as the Hartmann case has. The inside binding of CPX-22 is a cheap vinyl as opposed to nylon. It tears more easily and wears out very easily. The lock is of inferior quality particularly in comparison to the Hartmann lock. The hardware on the bag is inferior to Hartmann's. The rivets used to attach the snap to the strap have too small a head and are therefore likely to pull through the shoulder strap. The bag uses smaller lighter weight zippers than the three on the Hartmann case. Accordingly they will not hold as much pressure and they will pop open when the case is packed. The overall workmanship of CPX-22 is fair and the materials are poor. Mr. Davis is of the opinion that CPX-22 is definitely a lower quality product. (R. Davis CX-79 at 18, 19).

213. The carry-on bag CPX-23, identified as from has gliders which are not set into any polypropylene or support materials and hence they can be easily torn off. There is no spring wire in the edge of the case such as the Hartmann case has. The inside binding is a cheap vinyl as opposed to nylon. CPX-23 tears easily and wears out very easily. The hardware on CPX-23 is inferior to Hartmann's. The rivets used to attach the snap to the strap have too small a head and are likely to pull through the shoulder strap. CPX-23 uses smaller and lighter weight zippers than the three zippers on the Hartmann case and hence will not hold as much pressure and will pop open when the case is packed. Mr. Davis is of the opinion that CPX-23 has poor material selection and poor workmanship and is a definitely lower quality product. (R. Davis CX-79 at 19).

214. The 26 inch soft Pullman with the name Melissa written on the inside (CPX-24), identified as a soft pullman suit case from has a poor handle attachment. The case uses a spring steel welting, not a spring wire welting. Unlike the spring wire which will take a blow and straighten back out, the spring steel will bend and continue to have the bend in it. The leather on the outside of the case is an inferior leather. The hardware is also inferior. The stitching looks to be spun core polyester which is weaker than the nylon stitching on the Hartmann soft Pullman. The polyvinyl chloride frame on the inside is inferior to the Hartmann ABS frame and had already broke in a number of places. The lining does not have a urethane backing on it. The stitching on CPX-24 is coming apart in many places. The inside support material is a cheap foam as opposed to the Hartmann latex impregnated elastomeric resilient fiber. The fiber in CPX-24 will break down quicker. Mr. Davis is of the opinion that the

workmanship of CPX-24 is fair, the selection of materials is poor and the bag is an inferior, low quality product. (R. Davis CX-79 at 19-20).

215. A Tumi garmet bag does not copy the Hartmann trade dress although it performs the same function as the Hartmann garment bag. As the Hartmann bag, it has nine pockets. (R. Davis Tr. at 467).

216. A Ventura bag (CPX-15) does not copy the Hartmann trade dress although it functions in the same way as a Hartmann bag. Each has handles, shoulder straps and outside pockets. (R. Davis Tr. at 468).

217. A French case (CPX-16) does not copy a Hartmann trade dress although it functions to a certain degree as a Hartmann hanger bag. (R. Davis Tr. at 468).

218. CPX-4 has been identified as a Hartmann A4(A3) attache case in vinyl. CPX-43 has been identified as a product from Ivey's. The stitching in CPX-43 is either a spun core polyester or a nylon-combination as opposed to 100 percent nylon in the CPX-4. The thread in CPX-43 will wear out much quicker than the thread in CPX-4 which is all nylon. The stitches are longer in CPX-43 than they are in CPX-4. The more stitches per inch that there is makes for a tighter or a stronger piece because if one stitch breaks there is many more stitches to hold the bag together. It is more expensive to make something with more stitches per inch. It takes a lot more thread and it also takes more time to manufacture. Vinyl in CPX-43 is inferior because a key when rubbed along the vinyl tears the vinyl as opposed to the Hartmann bag where when the key is rubbed on it, one cannot actually feel it. The valance on CPX-43 is an inferior product. The inside valance of CPX-43 is a latex-impregnated paper valance as opposed to CPX-4 which has a copolymer extrusion inside it. The valance on CPX-43 will break down and stay bent; the

valance in the Hartmann product, although it can be bended, will spring back and take its original shape. Also the manner in which the Hartmann case is made will avoid stress which is in contrast to the manner in which CPX-43 is made. The locks on CPX-43 are plastic locks. The locks can be broken with a very simple pull which will not work with the Hartmann. The striker which engages the lock on CPX-43 is a very flimsy material which can be bended and the rivets torn off. In contrast CPX-4 has a case-hardened striker that cannot be torn off the top of the case. The actual box on CPX-43 appears to be some type of plastic or extruded type of product as opposed to the wooden box on Hartmann CPX-4 which appears to be very sturdy, very firm. The hinge attachment on the back of the case on CPX-43 with just a little amount of pressure pushing down on the case, loosens. This cannot be done with the Hartmann case. The actual strapping material on CPX-43 is reinforced but it is very weak as opposed to the Hartmann strap. Mr. Davis with one hand was able to rip off the lock strap on CPX-43. CPX-43 has rivets installed through the handle into the case as opposed to Hartmann CPX-4 which has bolts, nuts and washers all the way down at the bottom. In the side of the case, the lining on CPX-43 appears to be of a quality similar to the lining on the Hartmann case. Also the strap attachments on CPX-43 appear to be of fair quality. (R. Davis Tr. at 502-508).

219. With respect to CPX-2 identified as a Hartmann A4 (A3) attache case in belting leather and CPX-44 identified as a K-mart attache in leather, CPX-44 has the polyester thread whereas the Hartmann CPX-2 has nylon thread. CPX-44 has less stitches per inch than CPX-2. The same plastic lock is on CPX-43 as on CPX-44. Thus CPX-44 has plastic locks as opposed to all-metal locks on CPX-2. CPX-44 has bendable, lightweight metal strikers as opposed to

the case-hardened striker on CPX-2. The striker in CPX-44, if bent when something hard is put on the case, may render the case useless because the striker will not engage the locking mechanism. Also if CPX-44 is overpacked and the case is attempted to be closed and the case has to be pressured to close it, the case could be gotten in an off center position and the case will stay off center while it is being carried. CPX-44, unlike CPX-43, has an internal valance as opposed to an external valance. It is the same material as the material on CPX-43 which also will bend and the case will not be properly closed. CPX-44 has a much lighter-weight hinge than the hinge on CPX-2 and with a little pressure the hinge on CPX-44 can be loosened. CPX-44 has also a plastic frame on the inside as CPX-43 unlike the wooden frame with fiber reinforcement on Hartmann CPX-2. The handle attachment on CPX-44 has rivets as opposed to the bolts the on CPX-2. The leather on CPX-44 is probably however is a dye-through leather. The handles are secure on CPX-43 and CPX-44. (R. Davis Tr. at 509-514).

220. Comparing CPX-43 and CPX-44, the type of attachments on CPX-43 and CPX-44 that fastens or secures the handle to the box itself is identical. It is the same type of rivet positioned in the same place. The method in which the panel has been padded and installed into the case in CPX-43 is identical to the method that it is installed and padded on CPX-44. There is a foam padding material inside the handle or handle saddle i.e. the grip on CPX-44. CPX-43 has the same identical saddle. The locks are identical on both CPX-44 and CPX-43 with the exception of the cover plate or the insert that appears inside the lock face. The fiber material that is used on the inside valance of CPX-44 is the same as the material that is used on the exterior valance on CPX-43. The construction of the inside of the cases is

almost identical with the exception of the pocket arrangements. The stays inside the two cases are not identical and the hinges on the back of the cases are not identical. Mr. Davis' opinion is that CPX-43 and CPX-44 came from the same source. (R. Davis Tr. at 516, 517, 518).

221. Mr. Davis is of the opinion that the Hartmann products are much superior in quality when compared to CPX-43 and CPX-44. (R. Davis Tr. at 520).

222. Comparing CPX-20, identified as a hanger bag from Montgomery Ward, with CPX-37, identified as a Hartmann hanger bag in peanut butter, CPX-20 has a center handle that looks almost exactly like CPX-37. It feels strong. CPX-20 has an aluminum center board or some type of metal center board underneath the center handle board as opposed to CPX-37 which has an ABS extruded handle board that is much sturdier and much stronger. The light-weight aluminum or metal fabrication is very easy to bend and once it is bent it stays bent as opposed to the board in CPX-37 which when bent will spring back. If there was a bending on CPX-20 two or three times, the metal would become stressed and more than likely break. The fabric on CPX-20 is a nylon fabric as on CPX-37. However the fabric on CPX-20 is a much coarser and looser wear which does not make the material on CPX-20 as strong or as abrasive-resistant as the material on CPX-37. There doesn't appear to be a back coating on the material on CPX-20. On CPX-37 all the material is back coated with a urethane. The urethane helps lock in the fibers at the seam or at the edge where the seams are installed. Also it helps keep moisture from either penetrating or coming out of the case. A urethane backing prevents seam rip-out on the bindings. CPX-20 is stitched with a polythread as opposed to the much heavier nylon thread, which is much heavier, used on Hartmann

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CPX-37. The vinyl on CPX-20 is an inferior vinyl and it has no clear top coat on it. When a key is run across the vinyl on CPX-20 the surface is torn. On top of the vinyl of CPX-37, there is three or four mils of clear laminated vinyl. With the clear laminated coating a key can be continuously run across the vinyl and the vinyl won't tear. Also with CPX-20, with just a little amount of wear, the color will wear off the top of the vinyl and the base coat on CPX-20 will appear which is a lighter color and will discolor. With Hartmann CPX-37, four mils of vinyl would have to be worn off the top before one gets to the print color. The straps on CPX-20 that attach the flap to the lower pocket are two pieces of vinyl that is believed to be merely glued together and stitched around. Referring to the outside flap pocket, when Davis grabbed the flap on CPX-20 and pulled on the flap, the strap that attaches the flap to the bottom broke in the center. The Hartmann strap is laminated to a leather on Hartmann CPX-37 and this avoids breaking. The zippers on CPX-20 are an off-brand zipper. The zipper on Hartmann CPX-37 is recognized around the world as a very high quality zipper. With CPX-37, the buckles on the lower part appear to be a stamped buckle or a very light weight buckle as opposed to the very heavy cast buckle on Hartmann CPX-37. The actual stitching of the seams, referring to the lightweight thread and polyester thread used on CPX-20 allows the seam to be easily torn apart. Mr. Davis was able to tear the seams apart on a lower outside pocket on CPX-20, as opposed to Hartmann CPX-37, which even with a tremendous amount of pressure, the stitch line did not pull apart. Mr. Davis was able, with a simple pull, to tear off a pocket on CPX-20. The hardware on CPX-20 is very lightweight hardware. It is riveted on and it is a good riveting system. A brass lock that is used on Hartmann CPX-37. The top hook on CPX-20 can be bent with just a slight pull. However the hook on Hartmann hanger bag CPX-37 has a case hardened ring and chain assembly riveted into the case. The top handle on CPX-20 is of the same type of construction as the lower buckle flap which is merely vinyl with no support material inside whatsoever and is easily pulled out of its attachment as Mr. Davis showed. The top handle on a Hartmann case, as CPX-37, has a polypropylene reinforcement material on the inside and it is stitched all the way through into the case with nylon thread where one would have to tear the whole seam out of the case to break the handle off. Mr. Davis was not able to move the handle on Hartmann CPX-37. The pockets on CPX-20 on the back side of the case can be easily torn off because the stitches are very long and it is a very lightweight, very thin thread. Loose threads are hanging around on the inside of CPX-20. The binding on the inside of CPX-20 is a vinyl binding as opposed to a nylon binding that is used on the interior of Hartmann CPX-37. Also the stitching on CPX-20 ran off the edge. (R. Davis Tr. at 521-530).

223. Mr. Davis is the the opinion that CPX-37 is high quality while CPX-20 is a very, very poor quality. (R. Davis Tr. at 530).

224. CPX-21, identified as a hanger bag from American Guard-It, has no urethane coating on the back of the material as found on CPX-37. CPX-21 does have a good zipper or a better brand of a zipper than on CPX-20. CPX-21 does not have the same clear topcoat as CPX-37 which makes the vinyl on CPX-37 much tougher and stronger. Scratches can be made on the center board of CPX-21. The center handle on CPX-21 appears to be supported well. It is made of the same vinyl and has support material inside. CPX-37 can take a blow and and then spring back. It takes more pressure to stress the material on CPX-37 than the material on CPX-21. The bottom straps on CPX-21 are very flimsy.

Also the stitching on the pockets is very poor. Mr. Davis was able to tear a lower pocket loose on the edge of CPX-21. The stitching on CPX-21 appears to have been stitched with either a spun core polyester or some type of poly thread other than nylon. The shoulder strap on CPX-21 does have a lightweight leather backing but it is very flimsy. If the strapping is pulled it can be broken in half. A leather split has been used to back the shoulder strap on CPX-21 and the leather split itself is very unstable. Also the hardware on CPX-21 is a lighter weight and a lower grade of quality hardware than what is used on CPX-37. The top handle on CPX-21 appears to have the same support material which again is stitched with the poly thread which does not have alot of holding power and is easily torn right out of the top of the case which Mr. Davis was able to do. The inside of the case of CPX-21 is a very lightweight vinyl binding as opposed to the nylon binding used on the inside of CPX-37. (R. Davis Tr. at 531-535).

225. Mr. Davis is of the opinion that CPX-21 is a much, much lower quality than CPX-37. (R. Davis Tr. at 535).

226. CPX-19, identified as a hanger bag from St. Ives, had been purchased by Mr. Davis' secretary, when he was employed by Hartmann, for testing of the product. An ad had quoted that CPX-19 was made of the same quality materials that the Hartmann product was. On testing Mr. Davis found that the nylon fabric was an inferior fabric to that of the Hartmann; that the fabric was a looser weave fabric and that it had almost zero water repellency as opposed to the Hartmann; that the abrasion factor on the fabric used on CPX-19 was much lower than the abrasion factor on CPX-37; that puncture resistance was much lower on the fabric used on CPX-19 as opposed to CXP-37. The vinyl on CPX-19 did not have the clear top coating. The straps, the

attachments on CPX-19, were not reinforced and were very easy to break and be pulled off the case. The pounds of pressure to pull the straps off on CPX-19 were very, very low. The hardware on CPX-19 was very inferior hardware. The hook on CPX-19 could be easily bent as opposed to the hook on CPX-37. The center of CPX-19 has some type of metal board which bends just like the board on CPX-20 and CPX-21. The thread on CPX-19 is of some type of polyester or spun core polyester that breaks and tears. (R. Davis Tr. at 536-538).

227. With respect to how CPX-19 was put together and how it was stitched together Mr. Davis is of the opinion that it was a fair job. However with respect to the material that was used, the material was a very, very poor quality. There was no real comparison to a Hartmann bag. (R. Davis Tr. at 538).

228. The pack cloth on CPX-22, identified as a carry-on bag from Kluge, is an inferior type of pack cloth because it does not have the heavy urethane coating on the back as in Hartmann CPX-39, identified as a carry-on bag in pack cloth. CPX-22 has less threads per inch. CPX-22 has less abrasion resistance and less puncture resistance as compared to Hartmann CPX-39. (R. Davis Tr. at 538, 539).

229. Comparing CPX-30, identified as a Hartmann carry-on in vinyl peanut butter with CPX-22, the vinyl used on CPX-22 appears to be of a lower quality than the vinyl used on CPX-30. The vinyl on CPX-22 does not have a clear coating on top as opposed to the clear top coating on CPX-30. CPX-30 cannot be scratched with a room key. As opposed to the lock on the front side of the case on CPX-30, the lock on CPX-22 is a very cheap, inferior lock. The

handles on CPX-22 appear to be of strong, well-constructed material. The back of the CPX-22 is made like CPX-37. CPX-22 has a welt around the outside of the case as opposed to the spring wire welt that is around the outside of CPX-30. The vinyl welt on CPX-22 if crumpled will stay crumbled as opposed to the springwire welt on CPX-30 which if bent will straighten itself out. Feet or legs on CPX-22, because they are not attached to anything inside, will pop right off as opposed to CPX-30. The zipper on CPX-22 is an off-brand zipper. On the inside of CPX-22 a cheap vinyl lining and support material is used which tears very easily. It has no strength in the edges as opposed to the Hartmann case which has a nylon center support material. CPX-22 has a plastic binding which can be easily torn. The hardware on CPX-22 is of a much lighter weight and cheaper in comparison to the Hartmann bag. (R. Davis Tr. at 539-544).

230. Mr. Davis is of the opinion that CPX-22 is much lower in quality than CPX-30. (R. Davis Tr. at 544).

231. CPX-29, identified as a Montgomery Ward carry-on does not have a urethane backing on the backside. It has a much looser weave fabric than the Hartmann CPX-30. The vinyl on CPX-29 can be torn with just one very easy rub on CPX-29. It does not have a clear top coating as does CPX-30. The handles on CPX-29 are identical to the handles on CPX-30 and are very weak and not attached to the case very well. They will pull off and R. Davis pulled one off. The handle on Hartmann CPX-30 is better secured to the case. The lock on CPX-29 appears to be a fair quality lock. However the cover that covers the lock on CPX-29 is stitched on in a manner such that it could be easily torn off the case and R. Davis did tear the lock off the case. (CPX-29). The flap on CPX-30 is not only stitched but it is also riveted onto

the flap to avoid any removal. The lock on CPX-29 with a very, very small amount of pressure tore through the flap on CPX-29. R. Davis could not tear the lock off CPX-30. The bottom of CPX-29 has metal gliders as CPX-30 but the gliders are not riveted into a support material as they are on CPX-30 and hence can be ripped off with ease. There is some loose threads in the inside of CPX-29 and the thread appears to be a polyester thread as opposed to nylon on CPX-30. A small amount of pressure on the back pocket of CPX-29 pulled out the seam with the threads being pulled out of the fabric. The zippers on CPX-29 are an off-brand type. CPX-29 does not have a springwire welt as does CPX-30. The bottom support material used in CPX-29 is nothing other than paper comprised of two very thin layers that are laminated together and then stuck in and which can be removed. The bottom support material in Hartmann CPX-30 is polypropylene that is riveted through the polypropylene so that it locks it in place and won't break down. The binding in the inside of CPX-29 is a vinyl binding and there are vinyl panels utilized as opposed to the nylon binding used on CPX-30. Overall the stitching on CPX-29 is crooked and there are some broken stitches around the outside of the case. The hardware on CPX-29 is of fair quality and better than some of the other products looked at but it is not as good a quality as the hardware used on CPX 30. (R. Davis Tr. at 545-549).

232. The quality of Hartmann CPX-30 is good; the quality of Montgomery Ward CPX-29 is poor. (R. Davis Tr. at 549).

233. CPX-23, identified as a carry-on bag from American Guard-It, does not have the amount of backing or back coating as does the fabric used in Hartmann CPX-30 and the fabric on CPX-23 appears to be a lighter weight and not as closely woven as CPX-30. The vinyl on CPX-23 appears to be inferior to

that of CPX-30. A key run across the top of the vinyl on CPX-23 will cut into the vinyl. Hence CPX-23 does not have the clear protective finish that is on CPX-30. The lock cover on CPX-23 is just stitched on and not riveted on and can be easily removed which R. Davis partially removed. The lock on CPX-23, underneath the lock flap, is a very cheap, low quality type of lock which with just a little bit of pull on the case can be torn off. The outside handle on CPX-23 is of low quality. It appears that some type of reinforcement material is inside CPX-23 which should make it less easier to come off the case. The luggage tag on CPX-23 is very poorly made. The saddle wrap around on the handle is a double lap vinyl and a very weak piece of vinyl which can be torn very easily. R. Davis did tear it with ease. CPX-30 is made with stronger vinyl and it is backed with leather and there is no way that the vinyl can be torn with one's hands. CPX-23 does have the same type of zippers that are utilized on CPX-30. However the glidders on CPX-23 are not fastened into a support material. The glidders are just fastened into the cloth which makes them more vulnerable to be knocked off on the bottom. CPX-23 does not have a spring wire welt as does CPX-30. The support material in CPX-23 is in the bottom of the case and it is a polyethylene or polypropylene type of material that is similar to the material used in the bottom of CPX-30. The lock used on CPX-23 is a stamp lock as opposed to the brass lock that is supplied with CPX-30. The binding on the inside of CPX-23 is a vinyl binding which is very weak and a very inferior type of binding. It can be pulled off with no problem. The nylon binding that is used on the inside Hartmann of CPX-30 cannot be pulled off. The attachments on CPX-23 appear to have no nylon support material installed in them and hence they can be torn off. The nylon reinforcement inside the D-ring on the top of Hartmann CPX-30, in contrast, can undergo stress. Overall quality of CPX-23 would be classified as poor. (R. Davis Tr. at 550-551).

234. CPX-24, identified as a soft pullman case from Weiners Luggage and Pungkook, appears to have a strong handle. As the handle on CPX-10, identified as a Hartmann soft pullman suitcase in pack cloth with leather trim, the handle is attached with a metal clip. However the handle on CPX-24 is attached with a very small headed rivet through the metal clip as opposed to the bolt on CPX-10. The bolt, nut and the washers that are underneath on CPX-10 make the handle on CPX-10 a weaker handle. The saddle loop in the center of the handle is not as good a quality as the saddle loop on CPX-10 because it is a much lighter weight piece of leather and it is some type of material that makes it look odd. Th nylon on CPX-24 appears to be a good quality nylon. It does have a back coating on it. It feels like a heavy back coating. CPX-24 has a much tighter weave fabric and it appears to be virtually the same fabric that is used on Hartmann CPX-10. The exterior edge around the outside of the case (CPX-24) has been put together with a spring steel frame as opposed to a spring wire welt on CPX-10. Hence when CPX-24 takes a blow or is bent, it will stay bent as opposed to CPX-10 which when bent will pop back out and straighten itself out. The lining on the inside of CPX-24 appears to be about a 40, 50 denier nylon as opposed to an 80 denier nylon on CPX-10. Also there is no back coating on the lining of CPX-24. CPX-10 has a back coating on the nylon. Across a stress point the lining has been torn. The frame material inside CPX-24 is a very cheap styrofoam support material that will break down and stay down as opposed to the very-expensive, resilient fiber material that is used on CPX-10. The support frame that is around the entire inside of the the case on CPX-24 is a rigid polyvinyl

chloride plastic which will break under stress, especially in the corners, and it is broken in certain corners of CPX-24. The bottom corners are not broken but it will break under stress as opposed to the frame on CPX-10. The profile of the extrusion on CPX-24 is the exact same profile that is used on the extrusion around the inside of CPX-10. CPX-24 has been stitched together with a spun core poly thread as opposed to the nylon on CPX-10. The spun core poly thread can be very easily ripped apart. R. Davis did rip the lining. As opposed to the nylon binding and thread used on CPX-10, the binding on the interior of CPX-24 is a very thin, lightweight vinyl binding which can be torn very easily and R. Davis did tear a piece off. The overall quality of CPX-24 is a poor quality as opposed to the quality of Hartmann CPX-10. (R. Davis Tr. at 556-560).

235. R. Davis is of the opinion that CPX-17, identified as Ivey's attache case from Starco, and CPX-43, identified as a vinyl attache from Iveys, are made by the same company. Also he believes that CPX-44, identified as a K mart attache case in leather, is made by the same company. (R. Davis Tr. at 560-562).

236. Hartmann cases are relatively high priced in the market. (R. Davis Tr. at 566).

237. The Kluge or St. Ives bag is about $75 or $80 lower in price than the comparable Hartmann bag. (R. Davis Tr. at 567).

238. R. Davis is of the opinion that Hartmann has a higher quality bag at a higher price as compared to Samsonite or American Tourister. (R. Davis Tr. at 570).

239. Striker is the top metal mechanism that goes into the body of the locking assembly that completes it. (R. Davis Tr. at 575).

240. Starco sleeve for attache (CPX-26) has the Starco name on it. The Hartmann name is not on it. (R. Davis Tr. at 587).

241. RPX-1 has the Starco name on the lock flaps and also on a string tag hanging off of it. (R. Davis Tr. at 587).

242. The lock on RPX-1 (Starco attache) has a concealed lock under the lock flap as does CPX-33 (Hartmann attache). The lock on RPX-1 is a plastic combination lock as opposed to a metal touch lock on CPX-33. There is a striker mechanism on the inside in the upper lid of RPX-1 which is shaped similarly to the striker mechanism on CPX-33. However the body of the striker on RPX-1 is plastic on the inside as opposed to the metal on CPX-33. They function very similar in that they are touch opened and touch closed. (R. Davis Tr. at 589).

243. There is no center lock on the Starco attache RPX-1 attache. There is a center lock on Hartmann CPX-33 attache. However there are not center combination locks on all Hartmann attaches. Hartmann CPX-3 attache has a center combination lock. (R. Davis Tr. at 590).

244. The Starco name is embossed into the material of the lock flap on RPX-1. The Hartmann name "Hartmann luggage" appears on a tag inside CPX-33. Also when the Hartmann attache was shipped from the factory it normally would have hang tags. (R. Davis Tr. at 590-591).

245. The purpose of a handle on a attache is to pick up the case and carry it around. The valance on a attache case, the narrow strip of fabric around the entire narrow edge of the attache, can conceal the gap between the two halves of the attache. It is more show than to stop dirt from

going inside the case. Depending on the type of product it is customary in most luggage manufacturing to provide some type of valance. Most of the time the time the valance is inside. The valance in Hartmann CPX-33 attache basically covers up the seam that the case makes. The real purpose of a valance is to keep the contents in the case. Papers can come out of an outside valance. The ideal valance for an attache case of the CPX-33 type is an inside valance. The outside valance on CPX-33 does cover the gap between the two halves of the case and to a certain degree it makes it more difficult for a piece of paper to slide through the gap. Hence the valance does seal the gap for papers and large items. It does not keep dirt out because there is such a wide gap. The outside valance on CPX-33 does help to keep dirt out. (R. Davis Tr. at 592, 593, 594).

246. On Hartmann CPX-33 attache a prominent window frame binding goes around the two edges of the two large sides. The fact that it is the same color as the leather offsets the leather and gives the case a picture frame effect. The binding defines the edge so the edge is very easy to see. The binding is intended to protect the corners of the attache against bumps and bruises. The reason the binding is on CPX-33 is because the case is a plywood box. The binding protects the wooden frame. (R. Davis Tr. at 594, 595, 596).

247. The side panel on CPX-33 starts out as a flat panel. The edges are turned down 90 degrees on each side for about three-quarters of an inch in depth and then the panel is put into the lid and positioned there and then stitched. The panel is pushed into the lid and sewed to the binding and the frame. (R. Davis Tr. at 595, 596).

248. One of the reasons the square corners on CPX-33 are advertised is that more contents can be gotten into the attache. Another reason is that

it is a theme adopted in Hartmann advertising. (R. Davis Tr. at 597, 598).

249. There is an "h" logo on the outside of the CPX-33.

250. A hinge on CPX-33 was specifically designed by Hartmann to bridge over a valance because nobody had a hinge that actually bridged over and created a tighter seal. The hinge holds the two halves together very strongly because Hartmann had had problems with hinges pulling off. The hinge also holds the case level on the bottom. It doesn't let it offset the body of the case. It keeps both sides level because it bridges across and comes up on the other side. This results in a better lasting case because the hinge is a much stronger hinge than what was previously offered in the marketplace for luggage makers. The special hinge makes the product better. (R. Davis Tr. at 599, 600).

251. The locks on CPX-42 and RPX-1 have the same function but a different method of locking. (R. Davis Tr. at 604).

252. R. Davis has no knowledge of actual customer confusion. (R. Davis Tr. at 605).

253. The CPX-43 attache has a latex impregnated paper fiber lining the inside of the valance. Hartmann uses a different kind of material. The construction of the gussets, the interior construction, was basewood on the Hartmann. A plastic, polyvinyl chloride, is used on CPX-43. (R. Davis Tr. 609, 610).

254. R. Davis was with Hartmann from 1968 through 1985 and he was responsible in large part for designing the soft-sided luggage. He is familiar with the attache and International series. (R. Davis Tr. at 611).

255. R. Davis did extensive testing and modifications of the luggage at Hartmann.

The sleeve is stitched on and that is welded together to create a circle and then welded again in the center to create the figure 8. (R. Davis Tr. at 612).

256. According to R. Davis, the Hartmann garment bag has a look, the carry on bag has some similar look but a different look. The attache and soft Pullman have virtually almost the same look but they all "encompass looks that play off of each other." (R. Davis Tr. at 613).

257. With respect to how the handle and the lock flap are fastened and thus cooperating together on the Hartmann A9 CPX-3, there is no such function and they are strictly aesthetic on that point because the metal clip holds the handle to the case. The metal clip is so designed to hide the hardware as the lock flaps were designed to get rid of the hardware and to cover up the locks below. (R. Davis Tr. at 724, 725).

258. There are several square-shaped attaches in the Amelia Earhart Luggage CX-80 and some are actually even squarer than Hartmann. The classic square attache is in durable fashionable leather-like vinyl. Two of the Amelia Earhart luggage on the third page of CX-80 are also square-shaped. They do have different handles from the Hartmann's figure 8 handle. CX-80 also shows Samsonite attaches with strong padded handles confortable to carry. (R. Davis Tr. at 729; CX-80).

259. CX-81 is a brochure from Lark Luggage. On the first page of the exhibit some handles come up from the bottom of the zippered carry-on luggage and fasten at the top with a saddle grip. However the snaps are exposed and it does not have rivets on the side. It also does not have the raised ridges. (R. Davis Tr. at 730, 731).

260. The attaches in CX-80 do not incorporate the Hartmann look.

It is possible to make a square looking attache without the Hartmann look and just about everybody in the industry does. When asked whether the carry-ons in CX-81, which have saddle handles and straps, incorporate the Hartmann look Davis answered "No, they do not". It is possible to make carry-ons with straps and saddle handles without infringing the Hartmann look. (R. Davis Tr. at 735).

261. Referring to CX-82, R. Davis testified that it is possible to make hanger bags without incorporating the Hartmann look. (R. Davis Tr. at 736).

262. Complainant's former employees, Messrs. Ira Katz and Robert Davis, were responsible for designing the Hartmann products at issue. (Katz CX-1 at 11; Davis CX-79).

263. Ms. Penix testified that, in the 1970's, she personally saw no non-Hartmann cases that had the Hartmann look. (Penix, Tr. at 207).

264. On the Hartmann carry-ons, Mr. Robert Davis testified that the actual use of a handle, starting at the bottom and coming up was not unique with Hartmann. (R. Davis Tr. at 639).

265. Robert Davis testified that the style of the handle was unique with Hartmann, i.e., the fact that it has two quarter-inch "beads" running down each side that form a rolled edge. Also, the saddle wrap for the handle is different from others in the market. It is a double wrap saddle which has the snaps concealed when it is folded up, and cushioned. Other companies in the market use the same general handle configuration, but without that particular stitching and saddle wrap features. (Davis Tr. at 639).

266. Ms. Penix testified that the fabrics used, colorations, and textures of the fabric all contribute to the total Hartmann look in a broad-brush sense. (Penix Tr. at 360).

267. In effect, Mr. Robert Davis believes that there is an umbrella trade dress with three or four Hartmann looks under that umbrella. (Davis Tr. at 613).

268. According to Mr. Robert Davis, the hanger bag has a look, the carry-ons has some of the similar looks but a different look, and then the attache and the soft Pullman have virtually the same look. However, they all encompass or they all incorporate looks that play off of each other. (Davis Tr. at 613).

269. According to Mr. Robert Davis, it is difficult to say whether the quality of the bag itself is part of what makes the Hartmann bag instantly recognizable. You can distinguish something that is quality or made with quality most of the time as opposed to something that has not been made with quality. However, there are times when it is very difficult to distinguish quality. (Davis Tr. at 619).

270. Ms. Penix testified that part of the Hartmann look, with respect to he products in issue, relates to the quality and textures of the materials used, as well as the selected color of those materials. (Penix Tr. at 193).

271. Ms. Penix testified that quality is part of the ingredients that make up the Hartmann look, but, by itself, quality has nothing to do with the Hartmann look. (Penix Tr. at 195, 201, 202).

272. Overall, with the exception of the walnut tweed color of the fabric attache cases, Mr. Robert Davis would leave color out of his description of what is recognizable as Hartmann. (Davis Tr. at 624-25).

273. During Mr. Robert Davis' time with Hartmann, Hartmann marketed, or introduced into the Hartmann line, probably five or six different browns, so he would not say color is an instantly recognizable feature of Hartmann attaches, except for the walnut tweed version. (Davis Tr. at 621-22).

274. Mr. Robert Davis testified that, as far as color is concerned, at least the walnut tweed color (CPX-33) of Hartmann's attache cases is a feature of the Hartmann look that is instantly recognizable. According to Mr. Davis, the walnut tweed version of the product has been running at Hartmann for at least 20 years, and that is recognizable as Hartmann, just as much as the fabric and the trim is recognizable as Hartmann, or the lock straps and some of the other things. (Davis Tr. at 620).

275. As for the color of the leather, Mr. Robert Davis testified that Hartmann belting leather attaches can go from a very dark brown to a very light brown, because it is natural leather. No two hides are ever the same color, so they vary. Yet, Mr. Davis also testified that he believed the color of the belting leather was instantly recognizable as Hartmann. The belting leather is used for the leather trim and also for the all-belting leather cases. (Davis Tr. 621, 660, 661).

276. On the carry-ons and soft pullmans, there have been several different colors of pack cloth that were used for the Hartmann--not changing the design or the features or the functions or the parts or the shapes of the parts on the cases--but only changing the color of the actual pack cloth fabric itself. (Davis Tr. at 622).

277. At various times, in addition to khaki colored pack cloth, Hartmann has introduced other colors, including yellow, burgundy, black, navy, sky blue and cocoa brown. (Robert Davis Tr. at 622-23).

278. Mr. Robert Davis believes that the color coordination between the welting, piping, trim, leather covers, and zippers are parts of the instantly recognizable appearance of the carry-ons and the hanger bags. (Davis Tr. at 625, 626).

279. In 1983, for the A4 and A9 attache cases, as a percentage of total sales, were in belting leather, were in a peanut butter vinyl, were in a brandy vinyl, were in a walnut tweed fabric, were in black jasmine vinyl, and were in ultrasuede. For the H3, in 1983, were in a pack cloth with a belting leather or brown vinyl trim. For the H1 style, were in a pack cloth in a belting leather or brown vinyl trim, and for the C2, were in a pack cloth with a belting leather or brown vinyl trim. For the soft Pullmans, were in a pack cloth with a belting letter or brown vinyl trim. (Penix CX-24 at 9).

280. Mr. Robert Davis testified that the overall appearance of the Hartmann attache case in issue is a combination of all the features of the case but is not limited to any particular feature. These features include the handle, the lock flaps, the riveted saddle, the concealed locks, the valance, the prominent window frame binding, the drop-in panel construction, the square corners, the prominent name identification, and the hinges. Mr. Davis would also include the stitching to a certain degree and the color coordination of the thread to the material, as instantly recognizable features of the Hartmann attache. Mr. Davis further testified that the hardware, the look of it, the fact that it is metal, and the fact that it is substantial hardware, are parts of the instantly recognizable features of the Hartmann attache. He further testified that one or two of said features on a bag doesn't necessarily mean that it is a Hartmann. (Davis CX-79 at 4 Tr. at 614-15, 617, 628).

281. Mr. Robert Davis testified that the features of the Hartmann soft pullman and attache instantly recognizable are the figure-8 handle, the binding around the side that creates a drop in panel effect, the lock straps, and the square look. (Davis Tr. at 629).

282. Ms. Penix described the unique and dominant features of the Hartmann A4 attache (CPX-2) as being: the lock straps that extend from the handles over the locks, the figure-8 handle in the center of the case which comes up to form an arc around which a saddle is adhered to the handle that is stitched on the top with two rivets, the square shape, and the Hartmann name. (Penix Tr. at 267-69).

283. Mr. Robert Davis testified that the handle configuration and also the square facial appearance are part of the distinctiveness and instantly recognizable appearance of the Hartmann carry-on bags. He further testified that the dominant features of the Hartmann carry-on bags are the square flap, the trim strip, the lock flap that goes over the lock that is on the side of the case, and the "h" patch, with the handles "crossing over." (Davis Tr. at 641, 643).

284. Ms. Penix testified that the dominant features of the Hartmann C2 and C3 carry-on bags (CPX-8; CPX-9), aside from the total overall look, would be the trim strip going across the middle, the tab in the front, and the Hartmann logo. (Penix Tr. at 313-14).

285. Mr. Robert Davis testified that the overall look of Hartmann's H3 hanger bag (CPX-6) includes the flat figure-8 saddle handle, the dual bottom pockets with dual leather buckles and leather binding, the color

coordination between the zippers and the trim, the marine-look hardware and the prominent trim strips. (CX-79 at 9; Davis Tr. at 625-26).

286. Mr. Robert Davis testified that the dominant features of the Hartmann hanger bags are the figure-8 handle, the saddle, the rivets in the saddle, and the shortened, simulated lock straps. (Davis Tr. at 653).

287. According to Ms. Penix, the Hartmann H3 hanger bag (CPX-6) has the following dominant features: the center strip across the middle to which the handle is attached and the flattened figure 8 handle with a saddle in the middle zone and with shortened lock straps. The most dominant features are said to be the handle, center board and the square shape. It is also said that the pockets were designed to give a very unique look in the marketplace. Thus although there are buckles the real release is a quick release snap. (Penix Tr. at 319, 320-21).

288. Ms. Penix testified that the dominant features of the Hartmann H1 hanger bag (CPX-7) are the center strip, the flattened figure-8 handle and the loop going over to form the simulated lock flaps. The lesser features that she believes constitute the Hartmann look are the square shape, the binding, the stitching, and the quality making up the total look. (Penix Tr. at 357-58).

289. Mr. Robert Davis testified that any carry-on bag that has the square flap, the trim strip across and the lock flap that covers up the lock in the center--would be a definite infringement on the Hartmann look. This would even be true, in Mr. Davis' opinion, in the case of a round hat box or a golf bag. (Davis Tr. at 677-78).

290. Michael Davis, called by respondent Starco, has had 38 years of experience in the luggage business. From 1952 through 1970 Davis was

President of Mayfab Inc., manufacturers of soft sided luggage. From March 1972 to October 1972 he worked as plant manager of Ventura Luggage which manufactured casual luggage. For the next eleven and a half years he was employed as Vice President, Product Development, of Airway Industries. Airway is a major luggage and attache company with annual sales of approximately forty million dollars. From March 1984 to the present he has been involved in, a luggage consulting design and sales organization which he established. (M. Davis RX-1 at 1-3).

291. Mr. Michael Davis testified at the hearing as a fact witness, based on his experience on the luggage business, and as as expert in the design and manufacture of luggage. (Davis Tr. at 1249-50, 1300).

292. The external features of a Hartmann International series attache are all functional with the exception of the hang tag and the Hartmann name and logo. The Hartmann handle is very comfortable and is easy to manufacture. It is comfortable because it is flexible, fills the hand very well and offers a lot of knuckle room. The sleeve with the raw edge is easy to manufacture because it does not require a highly skilled operator and the process can be semi-automated. (M. Davis RX-1 at 3, 4).

293. The lock flaps on the Hartmann International series are entirely functional. They were the subject of an expired mechanical U. S. patent 3,161,271 dated August 5, 1963. A number of the functional aspects of the lock flaps are described in the patent. The lock flaps protect the locks from accidental manipulation, conceal the locks and deter access to the locks by unauthorized persons. In addition, depending on the exact location of the lock flaps they may also prevent dirt and moisture from getting inside the attache. The lock flaps may be very compatible with a figure-eight handle.

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Thus when a manufacturer decides to put lock flaps on his attache, a figure-eight handle is the best choice. In combination the two are easy to manufacture because one end of the lock flap and one end of the handle can both be secured by a single rivet and no extra component is needed to join them together. (M. Davis RX-1 at 3, 4).

294. The square corners on the Hartmann International series attache are functional in that they allow for maximum storage room inside the attache. The square corners are particularly functional in an attache because the papers, folders, etc. to be placed inside the attache also have square corners. The square corners give more cubic inches. The square attache is the basic construction of attaches. With square corners, one can pack square books and papers. Square corners have been the conventional way of making attaches. Most attaches have square corners. Very few have round corners. (M. Davis RX-1 at 4, 5; M. Davis Tr. at 1288).

295. The recessed locks on the Hartmann International series attache, being flush with the surface, are less likely to have abusive contact than raised locks. The external valance that is attached to the lid and overlaps the body of the case is functional in that it helps protect the contents from the elements. The valance helps prevent dirt, rain, snow, etc. from getting inside the case. Also it prevents the lid and body from lateral movement. The edge bumper binding is functional in that (a) it is the method of attaching the panel to the gusset, and (b) it protects the case from scuffing, particularly in the corners. (M. Davis RX-1 at 5).

296. According to Michael Davis the Hartmann International attache is essentially identical to what is shown in Hartmann O'Neil U.S. 3,161,271

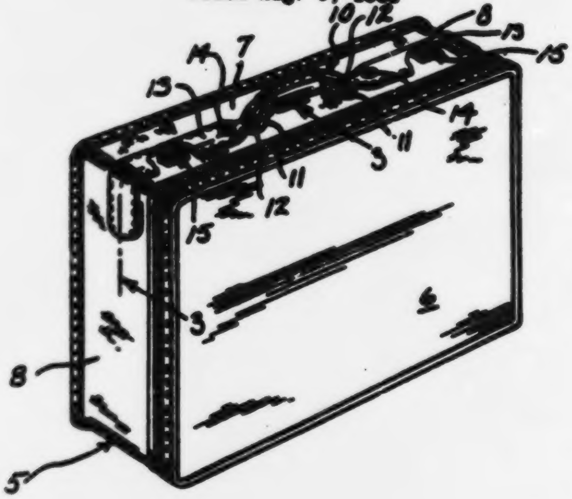
('271 patent) which issued Dec. 15, 1964 on a "Lock Protecting Handle Structure For Hand Luggage Cases", O'Neil U.S. Des. 198,661 which issued July 14, 1964 and O'Neil U.S. Des. 198,662 which issued July 14, 1964. (M. Davis RX-1 at 5).

297. Representative claim 1 of the '271 patent reads:

> 1. In a transportable case wherein a pair of companion, separable sections cooperate to form a six-sided body when said sections are mutually engaged, an assemblage applied to an outer wall portion of the case and including a grip portion, a lock mounted in the same wall the case between said grip portion and an end of said wall, said assemblage including an elongated strap extending toward said end of said wall of the case and completely covering the lock, and means of releasably connecting an outer end portion of the case which is right angularly related to the firstmentioned wall of the case, the intermediate portion of strap over the lock being free and being deflactable to expose the lock when the connecting means for the outer end portion of the the strap is released.

Figure 1 of the '271 patent is:

Filed Aug. 5, 1963



(RX-4).

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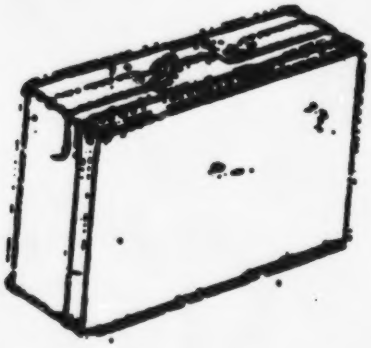
298. Design patent 198,662 shows a figure 8 handle on the attache. The saddle finger grip is shown in the patent. The same lock flaps on the Hartmann attache are shown in the patent. The patent further shows the square look of the attache CPX-2. The outside valance on the Hartmann attache is shown in the patent. (M. Davis Tr. at 1298, 1299, 1300).

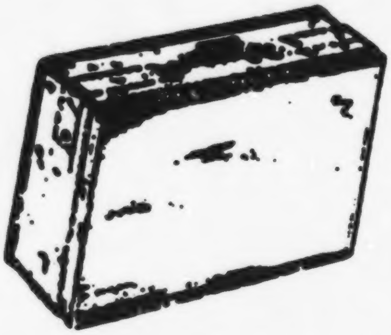
299. Each of the claims of Design patents 198,661 and 198,662 reads: "The ornamental design for luggage case substantially as shown and described".

Figure 1 of Design 198,661 is:



(RX-5).

Figure 1 of Design 198,662 is:



(RX-6).

300. Airways attache cases, on a retail basis, would run between $50 and $100. They are sold in retail outlets and any and all kinds of retail outlets. (M. Davis Tr. at 1251).

301. The figure-eight handle, as seen on Hartmann A4 attache case, which is wrapped in leather with the stitching around the outside, is made by

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other manufacturers but M. Davis does not remember seeing it done by others in leather. The major user of figure eight handles to Davis' knowledge was Airways. Airways used both stitched handles, as with CPX-2, and extruded handles without stitching. (M. Davis Tr. at 1254, 1255).

302. A lock flap could be run from one side of a case over the top to the other side of the case. There can be different lock flaps than what is on CPX-34 to cover the locks but M. Davis does not believe other lock flaps are commercially feasible. (M. Davis Tr. at 1257, 1259, 1260).

303. Airways had a handle very close to the handle of the CPX-34 Hartmann leather attache. It was a figure 8 handle with raised ridge on the saddle wrap. It did not have rivets on the ends. The looped handle portion had outer stitches and it was stitched in a ridge form. (M. Davis Tr. at 1274).

304. A figure 8 handle with a stitched raw edge and a raw edge grip has been a very commonly used handle through Europe for many, many years. Also the saddle has been common in Europe for many. many years. (M. Davis Tr. at 1276).

305. In the United States after 1972, 1973 the figure eight handle with saddle was a very commonly used handle. (M. Davis Tr. at 1277).

306. There is a bag made by Airways in the last few years that had lock flaps and a handle similar to the handle on attache CPX-2 but the attache was otherwise different. They back flaps were a little wider but fastened in the same way. The same type of rivet was used to fasten the lock flap. There was no valance on the Airways bag and the entire shape and construction of the body and lid were entirely different. It had round corners and it was hard-sided and had stitches on it. (M. Davis Tr. at 1284, 1287).

307. Hartmann attache CPX-2 has an external valance while the K-mart CPX-18 has no external valance. This shows that there are commercially

feasible ways of making valances other than the outside valance. (M. Davis Tr. at 1289).

308. A soft panel can be attached to the gusset without using any bumper binding. (M. Davis Tr. at 1291).

309. Other Bags other than Hartmann and the alleged copies use bumper binding with a drop-in panel as shown in Hartmann attache CPX-11. Thus it has been used on semi-molded luggage. (M. Davis Tr. at 1294).

310. M. Davis does not know if an external valance has been used by others. (M. Davis Tr. at 1294).

311. M. Davis testified that consumers in general would recognize a Hartmann because it has been around for 15-20 years, it has been heavily advertised and it is fairly or mostly unique in attaches. The handle would be very identifiable on an attache and the second main identification would probably be the bumper edge binding and the soft-side look. Also the flaps would be identifiable. (M. Davis Tr. 1296, 1297).

312. John Gallup has been a buyer of luggage, baseball, footwear and some clothing for K mart for a little over three years. He has been employed by K mart for 14 and a half years and about 13 years of that time Mr. Gallup was involved in some type with luggage. (Gallup RPX-10 at 3-5).

313. Gallup is familiar with the Starco case sold by K-mart and which is a subject of this investigation.

314.

315. Presentation from Starco at the spring 1985 overseas trip was made by Arnold Tsai who is the president/owner of Starco. It was either at the Starco's showroom in Taiwan or K mart's Taiwan offices. (Gallup RPX-10 at 26).

316. During the spring 1985 buying trip Mr. Tsai or a Mr. Sun discussed Hartmann as a product comparison. A Hartmann torn apart case was used as a competitive case. (Gallup RPX-10 at 39, 46).

317. The Hartmann case seen in Taiwan had lock flaps and a variety of a figure 8 handle. (Gallup RPX-10 at 43).

318. K mart does not sell the Hartmann attache. (Gallup RPX-10 at 49; RPX-10(2) at 47).

319. Gallup is not aware of any other attache that has lock flaps as the Hartmann and Starco attaches. (Gallup RPX-10 at 86).

320. Gallup testified that Messrs. Tsai and Sun said there were no patent problems because there was an expired patent and that Starco's case construction was different. (Gallup RPX-10 at 90).

321.

322.

323. Gallup has seen a number of attache cases that looked like the Hartmann attache case. (Gallup RPX-10 at 112).

324. A front view silhouette of a Starco case is very, very similar to the Hartmann attache. The side view is different and would be easy to distinguish. Hartmann has chosen to style the attache with a very square end. They have chosen to use a stand-up handle which one finds in alot of luggage pieces on the market. (Gallup RPX-10(2) at 11, 12).

325. K mart used a sleeve on Starco attache in merchandising the attaches. The sleeve was done to improve the sales. (Gallup RPX-10(2) at 32).

326. As to a comparison of the Starco attache with the Hartmann attache differences are in the construction of the case and combination locks on the Starco which are more convenient than a key lock or a push lock on the Hartmann attache. The honeycomb frames on the Starco was a big selling factor because it was a stronger case. The jute cases bought from Starco were trimmed in leather instead of a plastic trim or plastic frame around the face, the sewing operation is better in the Starco. The Starco has burnished edges on the leather handle for protection on both vinyl and leather and it also defines the case a little bit better - the Hartmann attache has a raw edge. A Starco name is put on top of the case and the name is also on the leather hang tag that is attached to the handle at the time of purchase in addition to appearing four times on the sleeve. (Gallup RPX-10 (2) at 41).

327. The interiors of a Starco attache and a Hartmann attache are different. Also in the tweeds, Hartmann uses an overlap to seal the case. There is no rim on the Starco case. The Starco has no trim down the side of the case. Hartmann has an offset handle which is not centered in the case. Hartmann has a rib down the side of the case and an extension of the leather up from the bottom that are not on the Starco case. Hartmann has a vinyl around the edges which is not on the Starco. Hartmann does not burnish the

edges and the number of locks are different. Hartmann identifies its case very clearly on the combination center lock with the Hartmann logo. The logo is used on the bottom hinges. Also on the side leather strap on one side is marked Hartmann. On the face of the case, there is the "h" logo for Hartmann. On the two two flaps of the Starco case, both are stamped Starco. Starco is marked four places on the sleeve used for containing the case. All Starco attaches sold at K mart are sold with a leather tag marked Starco attached to the handle. The Starco locks have the Starco emblem. (Gallup RPX-10(2) at 43, 44).

328. Handles used on Hartmann attaches are used on alot of luggage products. It is a common handle. Gallup was not able to identify a manufacturer who manufactures such handles nor identify a piece of luggage that has a handle that looks like the Hartmann handle. (Gallup RPX-10 (2) at 45, 46).

329. K mart sells the Starco cases in sleeves. (Gallup RPX-10 (2) at 45).

330. Wayne Sales has been a divisional merchandise manager of K mart since April 1986. From about March 1984 to April 1986 he was a single buyer for K mart. Prior to April 1984 Sales was a K mart sales manager and before that a buyer, assistant buyer, district manager, department manager, assistant manager and stock boy for K mart. In his employment at K mart he has been involved with some type of luggage since 1971. (Sales RPX-11 at 3, 4, 6, 7).

331. Sales first saw the Starco product involved in this investigation in April 1985 when he passed by Gallup's office in Troy, Michigan and before he went to the Orient. (Sales RPX-11 at 13).

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332. When asked whether Sales had ever seen a handle as on the Starco attache in issue or the Hartmann attache, he answered that he can not recall one on an attache but that it is fairly common on carry-on luggage, for example "Peter's Bags." Such a carry-on had a raised ridge handle. Sales has no idea who makes Peter's Bags. (Sales RPX-11 at 29-24).

333. With respect to the locked straps on the Starco and Hartmann attaches, the width is different and it does not adjoin a second flap. Sales cannot recall any other company, besides Starco and Hartmann, who uses the handles as are on the Starco and Hartmann attaches with lock flaps. (Sales RPX-11 at 35-37).

334. Gallup buyer's report states that for Christmas K mart was purchasing Hartmann look-alikes attache cases. The look-alikes are the Starco products which are the subject matter of this investigation. (Sales RPX-11 at 42, 43, 50).

335. The first time Sales saw a sleeve was in the K mart store in December 1985. (Sales RPX-11 at 43).

336. According to Sales, a Hartmann attache is a over-priced, upper-end merchandise sold in specialty stores and department stores. (Sales RPX-11 at 48, 49).

337. Sales would recognize the Hartmann attache on seeing it. It is square and the square corners would be distinctive. The rib on the ends is a very distinctive factor that would cause Sales to recognize the Hartmann attache, i.e. the inner rib which seals the case and a ridge which creates the square look. Sales refers to the inner strapping down the center portion and the outer ribbing around the two sides. The combination of the center strap

and the molded plastic rib makes Hartmann attache distinctive. (Sales RPX-11 at 49, 50, 81-84).

338.

339. Gallup did make a proposal that K mart change the style of its attache cases. (Sales RPX-11 at 65-71).

340. In the spring 1985 visit to Taiwan by K mart, a conversation came up regarding patents applicable to the Starco case and Sales was told by Mr. Tsai through Gallup that all patents had expired and there were no patents currently intact on the Starco attache. (Sales RPX-11 at 78, 79).

IV. Alleged Configuration Trademarks Are Nonfunctional

341. Mr. Robert Davis testified that there are a variety of ways that an attache case can be designed without using elements of the Hartmann attache case; that there is no reason why the particular saddle handle used by Hartmann would have to be employed; that there are a variety of other hard and soft handles which could be used; that lock flaps of other shapes and forms could be used. For instance Davis testified that, one could use a flap from the lid to the body, a flap that starts and stops on the top without connecting the handle, a flap with a cutout, or straps that starts and stops on the top without connecting the handle, a flap with a cutout, or straps that go all the way around the case. Likewise, Davis testified that there are a number of ways to construct a case without using the binding around the top and the bottom which creates a window frame appearance in combination with a valence around the opening. (Davis CX-79 at 6).

342. Mr. Robert Davis testified that it is customary in most luggage manufacturing to provide a valance, and most of the time the valance

is inside, because that is the best valence. The valance is a narrow strip of fabric that goes around the entire narrow edge of the case. The valance is to conceal the gap or seam between the two halves of the case as in Hartmann attache CPX-33. The real purpose of the valance is to keep the contents in the case. (Davis Tr. at 591-92).

343. With respect to the Hartmann attaches, in discussing the figure-8 saddle handle, Mr. Robert Davis testified "[o]ff the top of my head" that there are probably 20, 30, maybe 40 other types of handles which would equally serve the function of being a handle. (Davis Tr. at 690).

344. Mr. Robert Davis testified that there are other alternative ways that one could cover locks on the Starco attache case without using the approach adopted by Star Leather. (Davis Tr. at 691-92).

345. Mr. Robert Davis testified that the handle on the Hartmann attache case has no functional interrelation with the lock flaps. (Davis Tr. 693).

346. The O'Neil utility patent does not disclose any utilitarian advantage associated with the overall appearance of the Hartmann attache cases. (SX-3).

347. Mr. Robert Davis testified that catalog sheets from Amelia Earhart and Samsonite (CX-80) show some of the many different attache designs on the markets. (Davis CX-79 at 6).

348. Mr. Michael Davis testified on alternative means of designing and fastening lock straps on a Hartmann attache case. (Michael Davis Tr. at 1255-57).

349. Mr. Michael Davis testified that it would not be commercially feasible to attach lock straps on a soft-sided attache case, such as the accused attache cases of K mart, by snaps on the front and back of the case.

The soft sided panels on the front and back do not afford a suitable fastening surface. However, alternative, commercially feasible, fastening methods for the lock straps--on the top and side gussets of the attache cases -- were described by Davis. (Michael Davis Tr. 1260-65).

350. Mr. Michael Davis testified that he has seen attache cases in the U.S. market with different kinds of handles from those used by Hartmann on the CPX-34 attache. (Michael Davis Tr. at 1273-74).

351. Handles similar to Hartmann figure-8 saddle handles, with a raw edge and finger grip, have been in common use in Europe for many years. Hartmann was the only company that had that handle in the United States before 1972. (Michael Davis Tr. at 1276-77).

352. Mr. Michael Davis testified that most attaches have square corners and that very few have round corners. Square corners are functional for the Hartmann attache, but they are characteristic of many attaches. (Michael Davis Tr. at 1288).

353. There are commercially feasibly ways of making valances other than the outside valance. In Mr. Michael Davis' opinion, the internal valance of respondent K mart attache is more advantageous then the outside valance of Hartmann's attaches. (Michael Davis Tr. 1289).

354. Mr. Michael Davis described alternative means of attaching the top and bottom panels of the attache to the gusset, without using the edge bumper binding found on Hartmann's A4 and A9 attaches. He noted that the Hartmann EC-7 model attache does not use such a binding. He further noted that the bumper binding is an old construction arrangement that was used quite alot in years past. (Michael Davis, Tr. at 1290-94).

355. The construction of Hartmann luggage is more costly than that of luggage manufactured by complainant's competitors. (Penix CX-24 at 10, 19).

356. Commercially available alternatives to the particular Hartmann bags in issue exist, as evidenced by the many competing attaches, hanger bags, carry-ons and soft pullmans that have been on the market which do not imitate the alleged Hartmann configuration trademarks. (CX-80 through CX-82; Robert Davis CX-79 at 9, 11-12).

357. A Tumi hanger bag, (CPX-14), Ventura hanger bag, (CPX-15) and a French hanger bag (CPX-16), show different ways you can make hanger bags and not copy Hartmann's hanger bag. (Robert Davis CX-79 at 9; Robert Davis, Tr. 467).

358. Mr. Robert Davis testified that there are numerous other ways that competitors could have made soft pullman pieces without imitating the overall appearance of the Hartmann pieces, including the saddle handle, the lock flap, and the trim stripping. (Davis CX-79 at 12).

V. Likelihood of Confusion

359. Settling respondent Dimensions Unlimited has advertising copy that refers to its Hartmann "look-alike" products. (CX-109).

360. Respondent K mart refers in an internal company memorandum, to "Hartmann look alike attaches." (CX-92 at 2).

361. The president of American Guard-It, Max Jaffe, indicated that the "accused bag" the company selected in the Far East for sale in the United States was a "definite copy" of Hartmann luggage. The type of "accused bag" is not identified in CX-129. (CX-129 at 37-39).

362. Some of the retail outlets that have carried Hartmann luggage have also carried respondents' luggage. (Penix CX-24 at 18; Rosenfeld CX-121 at 79; Bettinger CX-49).

363. Robert Davis testified that typically retail stores do not leave the hand tags on the outside of the attache cases when the cases are displayed. Such stores either open up the case and drop the hang tags down inside the case or cut them off and put them inside. (Davis, Tr. 694).

364. Respondents advertise in the same media and attend many of the same trade shows as complainant. (SX-8, Response No. 16; Roger G. Hochmann CX-101 at 25-29).

365. Page 5 of an Altman Luggage Co. 1985-86 catalog show five (5) pieces of luggage Attman purchased from Wiener's Luggage Inc. of Sherman Oaks, Calif. The page uses the phrase "We Don't Cut Corners". (Bettinger CX-49, Exh. AA at 5).

366. Monarch Dimensions, Kingport, Americant Guard-It, have advertised under their own name. (CX-90, 103, 104, 105, 106, 108, 109, 110, 111, 112, 113, 114, 119, 120, 130); Starco has its emblem embossed on its attaches CPX-44, CPX-31, CPX-21, CPX-18, RPX-1. In addition Starco CPX-26 sleeve is identified with Starco.

VI. Survey

367. In accordance with a request of the law firm Lerner, David, Littenberg, Krumholz & Mentlik, Dr. Michael Rappeport (Rappeport), president of RL Associates, Princton, New Jersey, conducted a survey (SURVEY) regarding confusion among certain luggage products. A copy of a report on the SURVEY is titled "Confusion Among Certain Luggage Products" (REPORT) and is dated September 1986. The specific surveys involved in the SURVEY were conducted by independent survey companies unrelated to RL Associates. (Rappeport CX-147 at 1, 2; CX-148).

368. Rappeport was qualified as an expert on market surveys. (Rappeport Tr. at 740; RX-147).

369. The stated goals of the SURVEY were to determine the degree to which products with the "Hartmann look and design" are identified by the public as coming from a specific source, and to determine whether individuals surveyed identify the style or look of the pieces as unique to a single, specific source even if they do not know or incorrectly identify the specific trade name of the source and to determine the degree to which some representation subset of the challenged products look is confused with that of Hartmann. (CX-148 at 1, 2).

370. According to the REPORT the SURVEY was based on a total of 1,198 interviews conducted in a total of 14 major shopping centers distributed throughout the United States. Persons interviewed had shopped for or purchased luggage within the last year. (CX-148 at 3).

371. According to the REPORT the questionnaire used in the SURVEY evolved through a series of stages. The first or qualitative phase was

conducted from January 8 through January 16, 1986 as a series of interviews most of which were held near or inside of a few retail luggage stores. It was said that the purpose of those interviews was to obtain a better understanding of how the purchasing public approached the buying of luggage, what they knew about the subject and some indication of the level of recognition of Hartmann as a brand. During this phase about 30 people were spoken to which included a few luggage store owners or managers as well as past and present customers. Based on this qualitative stage, a questionnaire was developed for use in a second stage or pilot test. A number of people both inside and outside RL Associates were involved in discussions concerning the make-up and form of the questionaire. However after digesting all these comments and going over Rappeport's notes and recollections of the qualitative phase, Rappeport personally designed and had complete authority over the final form of the questionaire as he did over all aspects of the study. (RX-148 at 4).

372. The pilot test (second stage) was conducted at three diverse shopping centers in Boston, Mass., San Antonio, Texas and Greensboro, North Carolina in February or March 1986. Each individual was interviewed concerning just one type of luggage. At this pilot stage interviews were conducted using only two of the three types of luggage, viz. the carry-on and the hanger or garment bag. (CX-148 at 4; Rappeport Tr. at 996, 997).

373. After the pilot test a full-scale study (third stage) involving three types of luggage, viz. the carry-on, the hanger or garment bag and the attache case, was carried out. No soft pullman was used in the SURVEY. Because neither the procedures not the questionaire were changed in any way subsequent to the pilot stage - i.e. precisely the same procedures and interview were used in the pilot and the full-scale studies - the pilot

interviews were included as part of the results presented in the REPORT. (CX-148 at 4).

374. The interviewing in the full-scale study was conducted between August 6 and September 8, 1986. During the questioning each interviewee was shown a total of four pieces of luggage. In each case it was said that the luggage was as it would be in a store setting except that names and or identifying letters, notably the Hartmann H, were covered up by tape. The interviewing was said to take a longer than usual time because only a few sets of luggage were available and they had to be moved sequentially from location to location. A minimum of 10% of each interviewer's work in each mall was said to be validated. (CX-148 at 4).

375. The interviewers were not told the purposes of the study or as to the specific goals of the project or the names of the client. (CX-148-at 4).

376. In the SURVEY probably 100 interviewers all over the United States were used and Rappeport never met any of them. (Rappeport Tr. at 1098).

377. With respect to the interviewers following instructions, the names on the luggage were hid but it is known that the covering material came off in one or two cases because somebody said "look, I see it right there, it says "Hartmann." Rappeport knows of no other instances where the interviewers did not follow instructions. The interview in issue was a very simple interview. A typical mall interview lasted 10 to 15 minutes. Rappeport testified that the interviewers do interviewing on a routine, regular basis. (Rappeport Tr. at 1098, 1099).

378. Within each shopping center, interviewers stopped potential respondents at random, and asked if they would be willing to take part in a

survey. The initial question was whether the individual had bought luggage within the last year. Specifically individuals were asked: "Have you shopped for or purchased luggage within the last year?" Individuals who answered yes to this question were considered to be in the applicable market and eligible for the survey. Those who answered no were considered ineligible and were not included in the sample of 1,198 reported in the results. (CX-148).

379. The shopping centers for the interviews were selected randomly from among all United States shopping centers on the basis of the following criteria:

1. The presence in the center of stores selling goods of the quality of Hartmann luggage. Hartmann is a high quality product advertised to and aimed at a so-called up-scale market. The centers actually used contained a wide variety of stores with a great cross-section of products.

2. Geographic diversity, both in terms of section of the country and size and type of city or suburban area in which the stores were located.

3. Availability within the center of suitable facilities for carrying out the interviews. Since the respondents were each shown several pieces of luggage, it was necessary that there be a suitable, fairly large area in which to actually carry out the interviewing.

(CX-148).

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380. Rappeport concluded in the REPORT that because of the wide range of centers used, and because the criteria for selection of the centers and ultimately of the individual interviewees were unrelated to either the purposes of the study or the nature of thre questions, except that the interviewees must have been recent buyers of luggage that it was his opinion that the sample reflected a random and representative cross-section of the potential buying public. (CX-148 at 3).

381. Generally speaking the shopping centers that were used in the SURVEY had an interviewing service which had a room or place for interviewing, especially when material had to be shown. The SURVEY was generally done in those rooms. The interviewers had to show a number of bags and the rooms had storage space. Most major shopping centers either prohibit interviewing or if they do not prohibit interviewing have a single interviewing service which is contracted with. Part of any contract is space that is made available for the interviewing. (Rappeport Tr. at 750, 751).

382. The shopping centers used had stores that sold some luggage. Rappeport believed that the shopping malls used had at least one store that carried Hartmann luggage although he does not know that for a fact. (Rappeport Tr. at 751).

383. Respondent Starco cases are sold by K mart. Rappeport does not know whether any interviewing was done at or near a K mart outlet. (Rappeport Tr. at 751, 752).

384. The shopping centers used in the SURVEY were designed to be what is called upscale. They are large shopping centers aimed to get a cross-section of people. They were upscale in the sense that they were shopping centers that appealed across a range of people. Upscale shopping

centers draw people at all income levels. Downscale shopping centers do not draw upscale people. (Rappeport Tr. at 752).

385. K mart is a midscale outlet. It appears in a number of shopping centers of this type, because upscale shopping centers have a range of stores, as they have a range of people that shop in them. Rappeport does not know whether the shopping centers used in the survey had a K mart. (Rappeport Tr. at 753).

386. Rappeport would not characterize K mart as upscale. (Rappeport Tr. at 753).

387. In the SURVEY brand names and hang tags were attempted to be covered because an identification on the trade look of the bags was wanted. (Rappeport Tr. at 753).

388. With respect to a mall intercept survey Rappeport testified that there are two ways to conduct it. The primary way is to be in an enclosed mall of some form. However almost every enclosed mall has a policy that would either prohibit surveys altogether or the mall has contracted with some specific continuing service to have exclusive use of that mall wherein there is a room available for interviewing. The second way is where people use outdoor situations in front of malls called mall intercept. In general as in the primary way, professional survey groups are used but there is no exclusives on that way of doing it. However where there is to be shown something as four pieces of luggage one is almost constrained to go to a place where they have facilities to interview and in which the mall has a single interviewing service that has been contracted with. The service has a reputation and advertise etc. that it has access to the following malls. (Rappeport Tr. at 1023).

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389. Rappeport chose randomly the people who run mall intercept surveys within the constraint of reputable people that either advertised in one of the several places that people do that which is the American Marketing Association Green Book and there is also a Blue Book. (Rappeport Tr. at 1023, 10243, 1025).

390. The following is the Type and Brand of Luggage, the City, State and Mall where interviews were conducted and the number of interviews in each:

I. HANGING BAG: KLUGE (CPX-35), MONTGOMERY WARD (CPX-36); HARTMANN (PEANUT BUTTER) (CPX-37)

City Mall	No.
Boston, MA (Prudential Center)	25
San Antonio, TX (Golden Gate Shopping Ctr)	24
Greensboro, NC (North Star Mall)	25
Colorado Springs, CO (Citadel Mall)	50
Fort Lauderdale, FL (Coral Reef Mall)	51)
Los Angeles, CA (Sherman Oaks Galleria)	25
Chicago, IL (Hawthorne Center)	50
Bridgeport, CT (Trumbull Mall)	50

HANGING BAG: AMERICAN GUARD IT (CPX-40), KLUGE (CPX-35); HARTMANN (PEANUT BUTTER) (CPX-37)

Atlanta, GA (Outlets Limited Mall)	50
Hidesville, MD (Prince Georges Plaza)	50

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II. CARRY ON BAG: KLUGE (CPX-28), MONTGOMERY WARD (CPX-29); HARTMANN (PEANUT BUTTER) (CPX-30)

Boston, MA	26
San Antonio, TX	24
Greensboro, NC	25
Minneapolis, MN (Burnsville Mall)	50
Detroit, MI (Tally Hall Mall)	50
Dallas, TX (Galleria)	25
Livingston, NJ (Livingston Mall)	50
Bridgeport, CT	51

CARRY ON BAG: AMERICAN GUARD IT (CPX-41), MONTGOMERY WARD (CPX-29); HARTMANN (PEANUT BUTTER) (CPX-30)

Atlanta, GA	50
Hidesville, MD	50

III. ATTACHE CASES: K MART (FABRIC) (CPX-31), K MART (LEATHER) (CPX-32), HARTMANN (FABRIC) (CPX-33)

Colorado Springs, CO	50
Fort Lauderdale, FL	50
Los Angeles, CA	25
Chicago, IL	50
Bridgeport, CT	51

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ATTACHE CASES: K MART (FABRIC) (CPX-31), K MART (LEATHER) (CPX-32), HARTMANN (VINYL) (CPX-42)

Minneapolis, MN	50
Detroit, MI	50
Dallas, TX	26
Livingston, NJ	45

(CX-148).

391. According to the REPORT the instructions provided to the interviewers for the survey were:

> "Interviews should be conducted in pencil. Responses should never be erased. Simply record everything the person says in response to the question.
>
> Record each "NO" to the screen question on the count sheet.
>
> Do not use any words or phrases except exactly what is written on the questionnaire.
>
> The responses to each question should be recorded next to the space reserved on the interview form for that given question or circled where appropriate.
>
> There are three types (colors) of questionnaires.
> The WHITE questionnaires are for the GARMENT OR HANGING BAGS
> The BLUE questionnaire are for the CARRY-ON BAGS
> The PINK questionnaire are for the ATTACHE CASES
>
> You will only have two of the three types.
> The quota is For a total of:
> To make the luggage uniform, we ask that the pockets are closed, zippers zipped, etc. on all of the luggage. Respondents are not to open luggage.
> Along those lines, the luggage should be displayed so that the respondent is looking at the same sides of the luggage for comparison purposes.
> The respondent should never see more than one piece of luggage at a time.
> After Q.4A when the respondent is told that the first piece of luggage is Hartmann, it is to be removed from the respondents

eye-sight (Put under a draped table, covered with a blanket, behind a screen etc.)
The respondent is then shown three other pieces of luggage (one at a time) labeled A, B and C. There is a rotation pattern. Begin with the piece marked with the "*". The piece you start with on Q.5, is the same piece you start with on Q.7.

Ask about the "*" piece; record response, ask about the next piece; record response and ask about the following piece; record response.
If respondent answers YES, THEY KNOW WHO MAKES A OR B OR C: GO TO Q.7
IF respondent answers No, THEY DO NOT KNOW WHO MAKES ANY: CONTINUE WITH Q.6
Show the respondent each piece of luggage (one at a time) and ask questions a, b, c and d.
We do not have any extra samples of this luggage and ask that you take good care of it to prevent damage.
IF YOU HAVE ANY QUESTIONS PLEASE ASK YOUR SUPERVISOR
UPON COMPLETION OF INTERVIEWING PLEASE RETURN ALL INTERVIEWS, COUNT SHEETS AND LUGGAGE TO R L Associates."

(CX-148).

392. The questionnaire for the survey was as follows:

LUGGAGE STUDY RG022

Hello, my name is ________________ from R L Associates. I'd like to ask you a few questions. I am not selling anything, I just want your impression of a product. It will only take a few minutes.

[IF NECESSARY: Your responses are confidential]

1S. Have you shopped for or purchased luggage in the past year?

1. YES - CONTINUE
2. NO - Thank you for your time. TERMINATE INTERVIEW

SHOW RESPONDENT PIECE OF LUGGAGE; ASK:
2. Can you tell me the manufacturer or brand name of this piece of luggage?
3. YES, ASK: Which manufacturer or brand name is that?

3A. Why do you say that?
[PROBE THOROUGHLY: What makes you say that?] GO TO ** BELOW

4. NO, ASK: Do you believe that [hanger bags or carry-on bags or attache cases] ... which look like this are manufactured by one company or more than one company?

1. ONE COMPANY: GO TO ** BELOW
2. MORE THAN ONE COMPANY: GO TO Q.4A

4A. Do you believe that [hanger bags or carry-on bags or attache cases] which look like this originally were manufactured by one company and then were copied by other companies or that [bags] which look like this were never identified with one company?

1. ORIGINALLY MADE BY ONE AND THEN COPIED
2. NEVER IDENTIFIED WITH ONLY ONE COMPANY

** TELL RESPONDENT: The luggage I just showed you is Hartmann luggage.

REMOVE FIRST PIECE OF LUGGAGE FROM RESPONDENTS VIEW

5. I'm going to show you some more cases.
SHOW RESPONDENT PIECE A;B;C ONE AT TIME

Can you tell me the manufacturer or brand name of this?
[CIRCLE NUMBER CORRESPONDING TO ANSWER]

[PIECE A] 1 YES, ASK: Which manufacturer or brand name is that?

2 NO: GO TO PIECE B

[PIECE B] 1 YES: Which manufacturer or brand name is that?

2 NO: GO TO PIECE C

[PIECE C] 1 YES, ASK: Which manufacturer or brand name is that?

2 NO:

IF ANY YES: GO TO Q.7

IF ALL NO TO A,B,C: SHOW RESPONDENT EACH PIECE OF AGAIN, ASK:
6. Which, if any, of the following reasons best describe why you answered "no" for this?
[CIRCLE LETTER OF LUGGAGE IF RESPONSE YES]

	LETTER OF LUGGAGE		
a) You have no opinion as to the manufacturer of the attache	A	B	C
b) You cannot tell whether the attache is a Hartmann product or whether instead its a copy of a Hartmann product	A	B	C
c) You believe the attache is a copy of Hartmann but don't know by who	A	B	C
d) You have some other reason	A	B	C

ASK EVERYONE

7. Is you age? 1. Under 30 2. Between 30 and 50 3. over 50?

INTERVIEWER OBSERVATION: RESPONDENT'S SEX 1. MALE 2. FEMALE

I ________________verify that I conducted this interview

on (date) ____________ at (time) ______________.

INTERVIEWER SIGNATURE:

May I have your phone number since my supervisor may want to verify that I conducted this interview?
(CX-148).

393. In the SURVEY, everyone saw the Hartmann product first. It was only when question 5 was asked that the interviewees were shown non-Hartmann bags. (Rappeport Tr. at 745).

394. According to Rappeport questions 2, 3 and 3A involved "Recognition of the Hartmann Look by name;" questions 4 and 4A as well as questions 2, 3 and 3A involved "The Hartmann Look as Originating from a Single Source". (CX-148 at 5, 6).

395. In the SURVEY Question #2 was asked of everyone. The people who answered "Yes" to Question #2 then were asked Question #3. Everybody who was asked "Question #3" then was asked "Question #3A." The people who were asked Question #3A thereafter were asked Question #5. The people who answered "No" to Question #2 then were asked Question #4 and if they were answered one company then they were told that the bag was a Hartmann bag and were asked Question #5. The people who got to Question #4 and said more than one company were then asked Question #4A and then those people were told that the bag was a Hartmann and were asked Question #5. Thus certain of the 1,198 interviewees was asked questions 2, 3 and 3A; certain other of the 1,198 interviewees was asked questions 2 and 4; and the remainder of the 1,198 interviewees was

asked questions 2 and 5. All 1,198 interviewees were asked question 5. (Rappeport Tr. at 1035, 1036, 1037).

396. The people who answered no to each of Question #5, then were asked Question #6 and then everybody went to Question #7 which was just a demographic summary. Before anyone was asked Question #5, the name of Hartmann was mentioned to them. The name of no other manufacturer was mentioned to the people. (Rappeport Tr. at 1037).

397. Each questionnaire was coded. There was a 5 digit ID code at the top right corner of the interview form. According to the code:

1ST NUMBER IDENTIFIES TYPE OF LUGGAGE
2ND AND 3RD NUMBER IDENTIFY THE CITY INTERVIEWS WERE CONDUCTED IN
4TH AND 5TH NUMBER ARE SEQUENTIAL NUMBERS ASSIGNED TO INTERVIEWS FOR REFERENCE

TYPE OF LUGGAGE	CITY	CITY		NUMBER	NUMBER
1 HANGING	1	0	BOSTON	#	#
2 CARRY ON	2	0	GREENSBORO		
3 ATTACHE	3	0	SAN ANTONIO		
	4	0	COLORADO SPRINGS		
	5	0	MINNEAPOLIS		
	6	0	FORT LAUDERDALE		
	7	0	DETROIT		
	8	0	ATLANTA		
	9	0	LOS ANGELES		
	0	1	DALLAS		
	0	2	CHICAGO		
	0	3	LIVINGSTON		
	0	4	HYATTSVILLE		
	0	5	BRIDGEPORT (TRUMBULL)		

Hence for example a code "30101" referred to "attache, Dallas, 1st person interviewed". (Rappeport SRPX-3, Ex. 3).

398. As to raw survey "25013," the "2" means "carry-on." The "50" means Minneapolis and the "13" is merely a sequential numbering. (Rappeport Tr. at 984, 985).

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399. Answers to question #3A were coded on the questionnaire with a number characterized as follows:

Q.3A Why do you say that?

Have it/friend/relative has it	1
General shape/style/looks it seen it	2
Specific feature: hardware, straps, trim handle, color, weight	3
Material (tweed, leather, etc,) texture	4
Quality/durability	5
associate the name with luggage heard the name/ name comes to mind	9
Don't know	Y
OTHER:	0

400. Answer to question #2 as well as question #3 and #5 were coded on the questionnaire with a number characterized as follows:

Q.2 Can you tell me the manufacturer of brand name of this piece of luggage?
Q.3 Which manufacturer or brand name is that?

Q.5 (same question)

Manufacturer's Name	Code
Hartmann	1
Samsonite	2
American Tourister	3
K-Mart	4
Oleg Cassini	5
General store name: i.e. Zayres, Sears, Penneys	6
Sasoon	7
Pierre Cardin	8
OTHER: "copy" or name other brand	0

(SRPX-3, Rappeport Dep. Ex. 3).

401. The various questions of the questionaire for the SURVEY corresponded the following codes used in the computer tabulations of the results:

Code	
1-0- to 1-05	Introductiory question
1-06	Question 1S
1-07	Questions 2 and 3
1-08	Question 3A
1-09	Question 4
1-10	Question 4A

(Rappeport SRPX-3, Ex. 3).

402. Code 1-08 on Rappeport Deposition Exhibit 2 (SRPX-3) is the total of all respondents to all three kinds of luggage, regardless of what they said, with respect to Question #3A. Column 1-08 is broken down into various individual columns which are defined in Rappeport Deposition Exhibit 3 (SRPX-3). For example, with respect to individual column 1, 51 respondents out of a total of 324 respondents responded to Question #3A by stating that" I have it, a friend has it, a relative has it etc." Rappeport classifies responses of the 51 respondents as showing secondary meaning. Rappeport Deposition Exhibit 2 shows that there were 116 multiple punches in the response to Question #3A which is a little over one-third of the total of 324. Multiple punches means that the particular respondents were recorded into more than one category because their answers required it. As individual column 1 shows, 51 respondents is 4.3 percent of the total 1,198 respondents who participated in the survey or approximately 16 percent of those responding

to Question #3A. (Rappeport Tr. at 919, 920).

403. Certain of the questionnaires used for attache cases contained errors by the interviewer or in coding for questions 4 and 4A. The type of errors and the questionnaires associated with the errors are shown in the tabulation below:

Type of Error	Questionnaire numbers
1) Question 4 (code 1-09) was asked even though a manufacturer was identified in question 3.Question 4 should not have been asked.)	30103, 30110, 35044, 35046, 37014
2) Question 4A (code 1-10) was asked even though the interviewee answered "One Company" to question 4. (Question 4A should not have been asked)	30505, 30540, 35001, 35023, 35025 35029, 35039
3) Questionnaire was coded as a carry-on even though the questions appear to be for attache cases.	26043-26050

(SRPX-4).

404. The errors in the attache questionnaires relating to questions 4 and 4A appear to have been accounted for by Rappeport when the data were recorded. Thus no significant changes in the final results would occur. The tabulation below shows Rappeport's results against a tabulation of the results including errors, to show that most of the errors (that would tend to inflate responses to codes 1-09 and 1-10) (questions 4 and 4A) were excluded.

	Questions													
	1-07										1-09		1-10	
Codes-----	"No"	1	2	3	4	5	6	7	8	0	1	2	1	2
Rappeport-	284	32	46	10	0	2	1	1	1	12	99	185	122	63
Tabulation	283	32	46	10	0	2	1	1	1	12	99	187	132	65

The "No" response indicates those that could not identify a bag with a specific manufacturer or brand name. In the above table the "Tabulation "figures included errors. As seen for example with 1 and 2 of code 1-10 and 2

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of code 1-09, Rappeport did not include errors. (SX-46; SRPX-4; Rappeport SRPX-3, Ex. 3, 4).

405. For the SURVEY, when the attache cases were exhibited all of the manufacturer's references were covered with the exception of one "H" left showing on a zipper of a hang bag. The "H" was embossed into the zipper. It was thought by Rappeport that either the covering of the "H" was missed or that the "H" would just not be so visible that people would pay no attention to the "H." Also from the answers to the questionnaires there may have been a case or two where something came off where the something was suppose to cover an origin source. However Rappeport believed that in 99 percent of the cases the origin source was covered. In the SURVEY when the bags were exhibited, no hang tags were exposed. Rappeport would not be surprised if some of the bags displayed in stores had hang tags showing. (Rappeport Tr. at 747, 748, 749, 750).

406. According to Rappeport the SURVEY started with a set of hypotheses. One was that people simply knew luggage as Hartmann. A second hypothesis was that people knew luggage was a single source but did not know the name of that source. The third hypothesis was that people now knew the luggage was made by several but for a long time knew the luggage had been made by a single source. (Rappeport Tr. at 754).

407. In the SURVEY, the respondents were not told that a bag was Hartmann until completion of all of question #4. (Rappeport Tr. at 769).

408. In the questionnaire all of the questions up to and including Question #4 and #4A went to secondary meaning. The remaining questions of the questions went to confusion. (Rappeport Tr. at 770).

409. Question #2 was asked of 1,198 people. Question #4 was asked

of 73 percent of 1,198 people and Question #4A was asked of 57 percent of 1,198 people. (Rappeport Tr. at 811, 812).

410. Of 1,198 interviewees who had purchased luggage in the past year, 324, or 27 percent in answer to question 2, viz "Can you tell me the manufacturer or brand name of this piece of luggage?' and question 3, viz. "If Yes; Which manufacturer or brand name is that?", associated the piece of Hartmann luggage (hanging bag, attache and carry-on bag) shown with a specific manufacturer or brand name. The results are shown below:

	Number	Percent
Hartmann	82	6.8
Samsonite	110	9.2
American Tourister	37	3.1
Oleg Cassini	9	0.7
Sassoon	11	0.9
Pierre Cardin	11	0.9
General Store Name	3	0.3
Other	62	5.2
Multiple Answer	(1)	(0.1)
No Association	874	73.0
Total	1,198	100.0

(CX-148, at 5; Rappeport SRPX-3, Exs. 2-4). Rappeport in his REPORT characterized the results as:

TABLE I

Hartmann	7%
Samsonite	9
American Tourister	3
All other	8
None	73

(CX-148 at 5).

411. Of the interviewees who had purchased luggage in the past year, in answer to question 2 and question 3, viz. "If Yes; Which manufacturer or brand name is that?", the following tabulation shows their responses of a specific manufacturer or brand name by type of luggage (hanging bag, carry on bag, and attache, units and as percentage of interviewees for each piece):

	Hanging Bag		Carry On		Attache	
	Number	Percent	Number	Percent	Number	Percent
Hartmann	21	5.3	29	7.1	32	8.2
Samsonite	24	6.0	40	9.8	46	11.8
American Turister	13	3.3	14	3.4	10	2.6
Oleg Cassini	3	0.8	4	1.0	2	0.5
Sassoon	3	0.8	7	1.7	1	0.3
Pierre Cardin	6	1.5	4	1.0	1	0.3
General Store Name	1	0.3	1	0.2	1	0.3
Other	24	6.0	26	6.3	12	3.1
No Association	304	76.2	286	69.8	284	73.0
Total	399	100.2	411 1/	100.3	389	100.1

1/ The total from the summary table (SX-46, at 3) shows 411, even though Rappeport says that there were 410 interviewees with respect to carry ons. (SX-46, at 1, 3, 5).

412. There are certain errors in the above tabulation that would change the results. For hanging bags, one interviewee said "Maybe Hartmann" (questionnaire no. 19013). This response is too indefinite to include and thus the "Hartmann" identification for hanging bags should be reduced from 21 (5.3 percent) to 20 (5.0 percent). For carry on bags and attache cases, Rappeport included in the carry on bag results eight questionnaires (26043 to 26050) that were coded as carry on questionnaires, but were, in fact, attache questionnaires. When the responses from these questionnaires are correctly included with the attache results, the number of interviewees identifying a Hartmann carry on as a Hartmann is reduced from 29 to 28, and the number of

interviewees identifying a Hartmann attache as a Hartmann increases from 32 to 33. In addition, the total number of carry on interviewees is reduced to 402 and the total number of attache interviewees is increased to 397. These changes will in turn affect the above percentages. (SRPX-4, questionnaire numbers 19013, 26043 to 26050).

413. Rappeport under subheading "Recognition of the Hartmann Look by name" testified:

> While the results of question 3A for specific brands are based on small samples it is notable that virtually every individual saying Hartmann describes some specific feature of the bag as their reason for believing the bag to be a Hartmann. Conversely fully a fifth of those naming Samsonite talk only in terms of it being the best know brand and in some cases explicitly say they guessed Samsonite for that reason.
>
> Thus despite the relative low market shareof Hartmann when compared to Samsonite and others such as American Tourister, there is substantial recognition of the Hartmann luggage by name simply on the basis of its looks.
>
> I conclude from this that Hartmann is known on the basis of its look or design to a significant fraction of the luggage buying public.

414. Of the 324 interviewees who associated the Hartmann piece (hanging bag, attache and carry-on) with a specific manfacturer or brand name, the following tabulation shows the distribution of reasons in answer to question 3A, viz. "Why do you say that?" given for such an association (total of 455 adds to more than 324 because 116 interviewees gave multiple reasons):

	Number	Percentage (of 1,198)
Have it, friend/relative has it - - - - - - - - - -	51	4.3
General shape, style, looks it, seen it - - - - -	134	11.2
Specific feature: hardware, straps, trim, handle, color, weight - - - - - - - - - - - - -	70	5.8

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Material (tweed, leather, etc.), texture - - - -	67	5.6
Quality/durability - - - - - - - - - - - - - - - - -	79	6.6
Associate the name with luggage, heard the name, name comes to mind - - - - - -	32	2.7
Other -	20	1.7
Don't know -	2	0.2
Total -	455	

(CX-148, at 5; Rappeport Exs. 2-4).

415. Interviewees to question 3A of the SURVEY that named at least one of the specific trade dress features claimed by Hartmann (square look, lock flaps, handle, outside valance, "Hartmann look") as a reason for identifying the piece of luggage shown them (whether with Hartmann or another source) are as follows:

Attaches------ 28 of 105
Carry Ons----- 27 of 124
Hanger Bags--- 15 of 399

Attache questionnaire responses 30101, 30103, 30104, 30106, 30117, 30211, 30216, 30223, 30224, 30228, 30230, 30242, 30243, 30248, 30302, 30325, 30328, 34021, 34029, 34030, 34031, 35007, 36009, 36011, 36046, 37013, 37032, 37033.
Carry On questionnaire responses 20114, 20314, 20319, 20321, 20327, 20328, 20339, 20410, 20414, 20417, 20419, 20423, 21023, 21024, 21025, 21026, 22001, 23009, 23025, 25019, 27016, 27030, 27036, 27044, 28018, 28035, 28044.
Hanger Bag questionnaire responses 10209, 10240, 10543, 10546, 11024, 11025, 12001, 12002, 12003, 13001, 14029, 16046, 18034, 18042, 19013.

416. Those interviewees who identified the piece of Hartmann luggage shown them with a particular company, represented the following percentages of all interviewees shown the luggage:

Total	Carry-On	Attache	Hanger
27.0%	30.2%	27.0%	23.8%

(CX-148, at 6; SX-46, at 1, 3, 5, Question 1-07).

417. In multiple reason responses, the number of times other responses were included with a guess (code "9") were as follows, for each of

the luggage categories:

	Code 1	Code 4	Code 5	Questionnaire No.
Attaches	-	1	1	30521
Carry on	1	-	-	20408
Hanger	-	-	3	10427, 10524, 13002

(See FF 422, 427, 430)

418. According to Rappeport's results, a total of 389 of the 1,198 interviewees were interviewed regarding attache cases. (SX-46 at 5).

419. Because of an error in coding with respect to questionnaire numbers 26043 to 26050, which were actually attache questionnaires but were coded as carry on questionnaires, the actual number of attache interviewees is 397. (SRPX-4, questionnaire numbers 26043 to 26050).

420. Of the 105 interviewees who associated a Hartmann attache case with a specific manufacturer or brand name in answer to question 3, the following tabulation shows Rappeport's results for the distribution of reasons given for such an association in answer to question 3A. (Total adds to more than 105 because 38 interviewees gave multiple reasons):

	Number	Percentage of 389 Total
Have it, friend/relative has it - - - - - - - - - -	14	3.6
General shape, style, looks it, seen it - - - - -	41	10.5
Specific feature: hardware, straps, trim, handle, color, weight - - - - - - - - - - - - -	19	4.9
Material (tweed, leather, etc.), texture - - - - -	23	5.9
Quality/durability - - - - - - - - - - - - - - - -	32	8.2
Associate the name with luggage, heard the name, name comes to mind - - - - - -	8	2.1
Other -	9	2.3
Don't know -	1	0.3
Total -	147	

(SX-46, at 5; code 1-08).

421. The percentages in the above tabulation would have to be adjusted for the fact that there were actually 397 attache interviewees rather than 389. In addition, there were 106, rather than 105 interviewees that identified the Hartmann attache case with a specific brand name or source. (SRPX-4, questionnaire number 26046; See FF 412.

422. The basis for the foregoing finding follows:

Q NUMBER	NAME OF CO.	CODE	WHY DO YOU SAY THAT?
30101	Skyway	3,4	A lot of their bags have the tweed on the outside with leather handles
30102	Samsonite	1	I recognize the pattern. It's similar to one I own.
30103	Hartman	2,5	It looks very much like it, sturdy-well made, stylish, quality material
30104	Hartman	1,2	I've bought Hartman before. They all look alike
30106	Hartmann	3	I recognize it as Hartmann because of the leather and the brass snaps
30107	Samsonite	2	Samsonite luggage is becoming more stylish-moving away from the traditional
30110	Hartman Co.	4	Hartman has this texture of luggage & Brown leather also
30112	Oleg Cassini	2	I saw some on sale that looks like it
30114	Oleg Casina	4	Because it looks like the Oleg casina Brand of Luggage with that texture
30117	Hartmann	4	I have looked at their luggage before. Its apparent because the tweed & leather gives it away too.
30121	Samsonite	2	Styling (?) not really
30124	Hartman	4	I just think it made by a company that begins with a H because of its canvas & leather appearance

30201	Samsonite	5	Just the way its made
30210	Hartmann	2	I've seen it in ads (w/e) n/e
30211	Hartmann	1,2	I recognize it - and I just brought some Hartmann luggage (we ne)
30212	Samsonite	2	It looks like a Samonite product (we ne)
30213	Samsonite	9,0	Because it's the only name I can remember at present (we) It just looks like what I picture, it to be (it?) Samsonite I mean (we ne)
30216	Hartmann	4	I recognize the sytle with the leather and cloth (w/e) n/e
30217	Gucci or Viritton	2	It just looks like it (we ne)
30219	Skyway	4	Because of the tweed (we) (ne)
30220	Samsonite	4,0	Because of the structure of the case, and the way the material is formed. It seems compact.
30221	gucci	4,5	Because of the fabric, and it looks like it's very well made.
30223	Hartmann	2	I know the style, I recognize it right away
30224	Koehler	2,3	It looks like one of theres (why) extra padded handle.
30227	gucci	4	They use alot of tweed material
30228	Samsonite	2	The styling of Samsonite, kind of squarish.
30229	Hartmann	1	I just bought luggage a few weeks ago.
30230	American Turrister	2	Cause of the shape (w/a) the squareness & rounded edges.
30231	Hartmann	2	I just saw them in a store
30232	Samsonite	3	It looks like it has a hard exterior.

30233	Samsonite	9	It's one of the more familiar brand names that comes to mind.
30242	Samsonite	4,3	The lether is a better qulity the lethe is more exsensive w/w becuse of the locks.
30243	Hartmann	5	I see'n many attace cases and this one seems expensive mean they look alike.
30245	Hartmann	0	I just know luggage (we ne)
30248	Hartmann	3,4	the tweed, the leather striping (we) the belt look, (we ne)
30250	Samsonite	2	Thinks it might be, looks like it. (we ne)
30301	Samsonite	9	It's one of the best name brand
30302	Hartmann	4,5	They are the ones with the cloth side and the leather trim (else) they do good work and it looks strong (else) nothing
30307	regency	1	Because I purchase that luggage yesterday.
30308	Airway	2	I think I saw that in the shop, Luggage shop.
30313	Samsonite	2	It looks like it to me.
30314	American tourister	9	It was the first brand name came to mind.
30315	American tourister	2	Because it was an American tourister.
30316	Samsonite	3	Because of the lock its a type of lock, samsonite uses.
30317	American tourister	0	American touriser came out with one first and Hartmann copied it.
30318	Sassoon	2,4	Because it has style and looks like sasson product with tweed and leather.
30325	Hartmann	2,4,5	It looks like a Hartman the way the texture is built also.
30326	Samsonite	5	Because it's a bag it look durable.

30328	Hartmann	2,4	Its square box with olathin fiber with leather handles
30331	Samsonite	1	Reminds me of a thing I had made by Samsonite
30332	American tourister	2	It look like American Tourister product.
30340	American tourister	5,2	Diffrent construction it has a sophisticated look
34005	Samsonite	9	Only name I can remember
34006	Samsonite	5	Because it's dureble. It look like the one I saw on a comachial.
34012	Samsonite	2	The structure and looks
34021	Samsonite	2,5	Square cut-looks quality made
34029	Hartman	3	It has thier styling, snaps and handel
34030	Hartman	1,2	Shape and I have one
34031	Samsonite	4,3,2	They styleing on it (ale) the reinforceing on the grip. (ale) the selection of the leather (ale) no.
34036	Samsonite	5	It look very nice, and Samsonite is a good product.
34038	Nomad	3	Stitching
34046	Samsonite	3,5	The threading and seems sturdy
30501	Samsonite	9	Its the only ones that I see in stores
30504	Hartman	1	I had one like this.
30506	America Tourister	5	I think it could be strong
30517	American Tourister	5	The brand is the best
30521	American Tourister	5,4,0	It's built sturdy and they use a lot of leather and convenient to carry.

30527	Samsonite	0	Because it said the name
30529	Delsex	0	It was on the case
30549	Samsonite	1	Because my father has one like it (p) just like it.
30551	Hartman	5,4	Good Quality (P) Real leather as oposed to vinal.
35007	Hartmann	1,2	I think my brother has one (P) Ive seen one styled like that
35009	Samsonite	9	Its one of the few lugagge names that I know of (w else) just a lucky guess
35021	Samsonite	0	I just think of Samsonite as attache cases or brief cases (P) I just think of Samsonite when I look at that type of luggage.
35030	Samsonite	Y	I don't know (w/e) no
35034	Members only	0	Its a lable on the luggage
35035	Saminite	9	Cause that the name I always here of
35044	Samsonite	2	It looks like Samsonite Luggage
35046	Samsonite	5	It look like a quality products and thats why I think that
36009	Hartmann	3,5	The way it is built and you know the feeling is real leather & the hardware also none
36010	Samsonite	5,3,4	Because of the way it is made. Because of the construction and the leather feel and loks none more
36014	Hartman	5,3	Looks like its well made & has a good frame the color is similar
36015	Hartmann	2	Because Ive looked at them before I liked it but the leather takes a beating so do not think Id buy it again no more
36020	Samsonite	5,4	Because it looks good & looks like real leather so I assume its samsonite

36029	Samsonite	5	Just by the quality it doesnt look cheap
36033	Samsonite	5	Because it looks strong like it can take a licking
36036	Samsonite	1,3	Because I baught a samsonite piece & it looked just like this. Same color & same hardware.
36041	Hartmann	1	I bought a whole set of it for my daughter when she went to college
26046	Hartmann	1	Because I know the style I just bought one for my husband. The same thing
26050	Samsonite	2	I seen some other pcs like this no
37013	Hartmann	2,3	The shape (we) the detailing, the handle, (we) nothing
37014	Samsonite	5	Pretty well constructed (we) nothing
37020	Hartman	5	Because the way it's made (now) well (mean) durable (else) nothing
37023	Hartman	1,5	We bought a hartman attache case (else) Its the best (way) The quality (else) nothing
37032	Hartman	2,4	Because of the looks of it (why) the leather structure. The only part that doesn't look right is the plastic piece (else) nothing
37033	Hartman	2,3	Because I know the construction of hartman is boxy (else) I know they're heavier than most (else) Nothing
30736	Hoffman	2	Because of the shape (we) nothing
37039	Samsonite	3	The colors are the same (else) nothing
30744	Samsonite	2	It looks like the one the gorrilla jumped on in the commercial (else) nothing
37045	American Tourister	1,2	My father has the same one. (mean) It looks the same (else) nothing
39010	Samsonite	4,5	It looks like it's leather & they make good quality.

39016	Samsonite	2	The way it is made it looks like some I have seen like it (w(else) no
39018	J.C. Penny	2	I saw it there or something like it (w/e) no
39019	Samsonite	3,5	The edges are very sturdy (w/e) 3,5 the surface is pretty solid (w/e) good quality stiching (w/e) thats about it
39023	Pierre Cardin	2,5	I have seen them at airports in London & Germany (w/) the quality
39024	Samsonite	2,5	It looks sturdy (w/else) I like it it just looks sturdy and samsonite always look more square (w/else)
39025	Samsonite	2,5	Just the basic stile and shape (w/e) It looks very sturdy (w/e) no

(SRPX-4)

423. According to Rappeport, a total of 410 of the 1,198 interviewees were interviewed regarding carry on cases. (SX-46 at 3).

424. Because of an error in coding with respect to questionnaire numbers 26043 to 26050, which were actually attache questionnaires but were coded as carry on questionnaires, the actual number of carry on interviewees is 402. (SRPX-4, questionnaire numbers 26043 to 26050).

425. Of the 124 interviewees who associated a Hartmann carry-on bag with a specific manufacturer on brand name, the following tabulation shows the distribution of reasons given for such an association (Total adds to more than 124 because 45 interviewees gave multiple reasons):

	Number	Percentage of 410 Total
Have it, friend/relative has it - - - - - - - - - -	22	5.4
General shape, style, looks it, seem it - - - - -	57	13.9
Specific feature: hardware, straps, trim, handle, color, weight - - - - - - - - - - - -	33	8.0
Material (tweed, leather, etc.) texture - - - - -	22	5.4
Quality/durability - - - - - - - - - - - - - - - -	22	5.4

Associate the name with luggage, heard the name, name comes to mind - - - - - -	14	3.4
Other -	6	1.5
Don't know -	1	0.2
Total -	177	

(SX-46, at 3, code 1-08).

426. The percentages in the above tabulation would have to be adjusted for the fact that there were actually 402 carry on interviewees rather than 410. In addition, there were 123, rather than 124 interviewees that identified the Hartmann carry on with a specific brand name or source. (SRPX-4, questionnaire number 26046; See FF 412).

427. The basis for the foregoing finding is as follows:

Q NUMBER	NAME OF CO.	CODE	WHY DO YOU SAY THAT?
20105	Hartman	3	Cause of the color & Tan straps
20111	Samsonite	1,2	That's the Luggage I have. Looks like it T/A
20112	Hartman	2	I've seen somelike this
20114	Hartmann	4,3	Because of leather & brass & snap also trim.
20301	Sassoon	2	Because Sasson bags look like that.
20305	American Tourister	1,3,4	it's similar to a garmet bag I just bought and it is almost made the same (else) the straps and the material are the same color (else) nothing
20307	Verdi	2,0	Because it looks like it, it doesn't look high quality.
20308	Samsonite	4,5	The material (w/e) it looks strong and durable (w/e) thats it
20314	Hartman	3	Because of the leather handle with the enclosure around it.

20319	American Tourister	3	Because of the leather grips (we) nothing
20321	Hartman	2	Because I know a Hartman when I see one. (w/e) nothing
20323	Pierre Cardin	0	Its inexpensive type of luggage they make
20324	Samsonite	2,5	Just from the way it looks it looks like samsonite. Well made
20327	Hartman	2	It looks like a Hartman
20328	Hartman	2	Because it looks like a Hartman
20334	Pierre Cardin	2	It looks like what they make
20339	Hartmann	2,5,4	I just know what it looks like its' distinctive, the nice heavy leather the brass is strong its good quality light weight and durable (w/e)
20340	American Tourister	1,2	I have some American Tourister and it looks similiar to it
20343	Polo	2,3	Because it looks like the polo line of mens bags (w/e) just the color of the material and the leather straps (w/e)
20349	Sampsonite	9,2	I saw a advertisement of Sampsonite and its familiar looking
20403	Skylark	2	Looks like their line
20408	Samsonite	9,1	Only luggage they look for or see. The Brand I buy.
20410	Hartmann	2	The style reminds her of Hartmann
20414	Hartmann	3	Color-leather trim
20417	Hartmann	2,3	It looks like the Hartmann I've seen in the store real leather trim
20418	J. C. Penny	2	Looks like penny's

20419	Hartmann	5,2	I know the quality of Hartmann and it looks like Hartmann.
20420	Samsinote	1	It looks like the kind I have at home
20421	Jordache	2	Looks like it
20423	Hartmann	3	Leather, trim, color
20424	Skyway	2	Looks like something they would make.
20429	Samsonite	9	Only brand he knows find quality
20436	American tourister	2	This piece looks like other of their line that I've seen
20446	Samsinite	3,5	Type of bottons, just the contruction of the bag looks like samsinite
20447	Samsonite	3	Lite, not bulky
20448	Samsinite	5,3	Has a nice quality look. flexible not bulky.
20501	Samsonite	9	Its a familiar name
20508	Ralph Lauren	2,4	The design - Ralph Loren is very into leather and designs
20515	Samsonite	9	It the only one I know of
20520	Pierre Cardian	2	It just looks like one
20521	Samson	2	It looks like one I saw
20522	American tourestor	1	Because I have a wholes set
20523	Gucci	3	Because it's the same color.
20524	East Pack	1	I have one
20525	Samsonite	9	That's the only brand I can guess at.
20534	Samsonite	9	It's the only brand I know
20540	Gucci	3,1	Because the zippers are the same (p) I have one.

20541	Jordache	2	I think I saw one that looks like that
20546	Hartman	1	Because I have one.
20552	Verde	2	Looks the same (p) ne
21002	Lark	4	Vinyl leather construction
21008	Pierre Cardin	4	The leather
21013	Samsonite	9	Only brand name I can think of offhand
21014	American Tourister	0	Logo placement on the bag
21015	American Tourist	2	Looks familiar thought I saw some that looked like this
21016	Samsonite Survivor	2,3	Has color scheme and shape of AP They've been doing
21022	Hartmann	0	The zipper has their insignia (on front)
21023	Hartman	3	Because of the leather trim and the color of the leather trim and I've seen it in ads
21024	Hartmann	1,3	He owns one, color, shape etc;
21025	Hartmann	5,3,4	Quality, leather, stitchings, looks expensive
21026	Hartman	5	It looks like Hartmann, high quality
22001	Hartmann	1,4,5	I have Hartmann Hand material I would buy it look at leather quality and the detail of it.
22002	Samsonite	5	Quality
22011	Sassoon	3	Compartment, lightweight size, everything in ?
22012	Avon	2	They make stuff like that. It just look like their type.

22013	American Tourist	1	Got a set
22014	Samsonite Sassoon	1	I wanted some luggage to travel as a travel salesperson & this looks like what I got
22015	Totes	2	Just looks like Totes
22016	Samsonite	1,4,3	I have one in another color just like the stripes here - They are real leather and wear well- ? to the color
22017	Shanon Luggage	Y	I don't know why I just think it is
22018	Sasson	2	Look like some I was looking at
22019	Samsonite	5,3	durable, nice weight
22020	Samsonite	5	Worksmanship - durable
22021	Samsonite	5	Quality looking like Samonite
22022	Samsonite	5	Workmanship looks like Samsonite
22023	American Tourist	4,2,3	Material very well like the design and weight
22024	Gucci	2	An ad for a designer luggage in magizine looked exactly like this
22025	Samsonite	5	Quality of the materials
23001	Cassini	2,4	The style and the leather design reminds me of their products
23002	Airway	2	It looks like what I've seen.
23009	Hartmann	4,2	The leather, I was looking at some and it was like that.
23018	Samsonite	9,0	Thats the first thing that came to my mind. Samsoniste is usually the luggage I but but not the soft side. I buy the hard, cause I think its gonna last longer.
23020	American Tourister	9	Thats what I see in advertisements and that comes to my mind first

23024	American Tourister	5,4	Because it looks like it is well made (w/m) The leather assessories. (w/e) That's it.
23025	American Tourister	0	Because Samsonite doesn't put this rubber on the handles
25007	Samsonite	2	The style is similiar to there-products
25013	Saminite	4,5	the construction and the material
25016	Simsinte	2	It reminds me of something that I was looking at
25019	Hartmann	4	They only work in leather, they only use the type of nylon material
25026	Samsonite	5	Because it looks like good quality. It just looks strudy.
25027	Sasoon	2,4	Because of the leather (p) I just looked at some luggage, and it had leather.
25028	Samsonite	9	Because they are the two names I know (p) Those are the names I reconi
25031	Samsonite	2	Looks familiar (p) I've seen some samsonite luggage like that.
25035	Samsonite	9	It's the only on I'm very familiar with
27002	Verde	3	The color & the straps (we) nothing
27007	Lauk	2,3	It looks like it (How?) The color (we) nothing
27009	Oleg Cassine	3	The Heavy Leather bag (we) nothing.
27010	Hartman	4	Quality is a soft material (we) leather (ne) nothing
27015	Sasson	2,3	It just kind of resembles that (how) the straps are the same (else) nothing
27016	Hartman	3,2	Because it looks similar to one (why) the leather trim and the color of the bag (else) nothing

27029	Oleg Casini	1	Because my daughter has the same one (else) nothing
27030	Sir-something	3	I recognize the leather handle and the color (else) nothing
27036	Oleg Casini	2	It just looks like it is. I think I've seen it before (else) The shape is the same (else) nothing
20738	Samsonite	9	Because it's the only kind of luggage I know (else) nothing
20740	Hartmann	3	The color & the trim (How) It's Khaki and its has leather trim (we) nothing
27044	American Tourist	4,2	The leather work is the same (else) The shape and the size are the same (else) nothing
28005	Land	4	Seems like the nylon and leather Pieces together makes me thinks it was Land
28006	American safari by Samsonite	2	Looks like it the way its made (w/e) It has a shinny surface like Samsonite (w/e) N/E
28011	Sasson	1,2	Because I've Bought some and it looks just like this at Sears
28013	Pierre Cardin	5	It looks like an expensive bag.
28015	Hartmann	2,1	I've got a piece similiar to it. Looks like it.
28018	Samsonite	5,3	It looks like a high quality bag workmanship. Good handles and leather straps (w/e) n/e
28019	Samsonite	1,2	It's like a piece of luggage I carry and its like that.
28021	Samsonite	9	Only luggage and name I can think of.
28035	Hartmann	2,3,4	From the style and color of it. (u/s) It just looks like Hartmann. (w/s). The leather binding (w/e) NC

28038	American Tourist	1,2	Looks like the black one I bought my son (w/e) N/E
28039	Jetline	2	Looks like one I've been looking at - nice looking (w/e) N/E
28040	L.L. Bean	2,5	Looks like L. L. Bean, similiar quality (w/e) This one is a little better quality However (w/e) N/E
28042	Samsonite	2,3,4	It looks just like one I. I looked at in the store & it was samsonite. W/S - color & way its made (w/e) NC
28044	Hartman	1,2	We bought Hartman & I looks alot like that one (w/e) N/E
28046	Gloria Vanderbilt	3,5	Its stiching looks well, made like Gloria Vanderbilt (w/e) N/E
28049	Jordache	1,2	Looks like some I just bought my grandaughter. (w/e) Looks the same. (n/e)

(SRPX-4)

428. A total of 399 of the 1,198 interviewees were interviewed regarding hanging bags. (SX-46 at 1).

429. Of the 95 interviewees who associated a Hartmann hanging bag with a specific manufacturer or brand name, the following tabulation shows the distribution of reasons given for such an association (Total adds to more than 95 because 13 interviewees gave multiple reasons):

	Number	Percentage of 399 Total
Have it, friend/relative has it - - - - - - - - - -	15	3.8
General shape, style, looks it, seen it - - - - -	36	9.0
Specific feature: hardware, straps, trim, handle, color, weight - - - - - - - - - - - - -	18	4.5
Material (tweed, leather, etc.), texture - - - -	22	5.5
Quality/durability - - - - - - - - - - - - - - - - -	25	6.3
Associate the name with luggage, heard the name, name comes to mind - - - - - -	10	2.5

Other	5	1.3
Don't know	0	0
Total	131	

(SX-46, at 1, code 1-08).

430. The basis for the foregoing finding is as follows:

Q NUMBER	NAME OF CO.	CODE	WHY DO YOU SAY THAT?
10208	Samsonite	2	It looks like something they make
10209	Hartman	1,4	Basicly the type of leather (why) I own hartman (w/e)n/e
10218	American Tourister	3	Just the type of leather catches & hooks
10220	Hartman	2,3	The style & colors (why) It just seems that way (w/e)n/e
10222	London fog	1	Because we got this type of luggage. (w/e) n/e
10225	JOrech	4,3	The color & the leathe because thats jordach's style.
10227	Samsonite	4	Because of the leather (why) somsonite leather feels like this (w/e) n/e
10231	Link	2	It's the only bag I've seen that was made similarly.
10233	Samsonite	2	I've seen this style before (m) Samsonite makes this we(ne
10235	Membership	2	I've seen it before.
10239	Skyline	2	It just looks like one to me (why) I don't know
10240	Hartman	2,3	It looks like the same color, with leather trim. I have seen many like it before.
10242	Looks like Samsonite	2	I think they produce a line similar to this (wene)
10249	Samsonite	2	It remins me of a peace I've seen

10401	Samsonite	2	Same type of style
10402	American Tourister	9	Only one I'm familiar with
10406	Hartmann	2,5	Looks like their luggage. High styling, quality
10410	American Tourister	2	Looks like the A.T. I see in the store
10412	American	2	Looks like the ones in the ad in the Post
10413	Piere CArdin	4,5	The material, workmanship
10416	Pierre Cardin	3,2	Trimming, color, style. It just looks like the P.C. I've seen before
10417	Samsonite	5	Quality product. Looks sturdy
10418	Earheart	3,4	Leather trim, tan lite material
10419	Samsinite	4	The leather looks like samsinite.
10423	Airway	4	The material, makes me think so.
10427	Samsonite	9,5	Popular Brand. It looks good, made nicely.
10433	Hartmann	5	I've seen it before Good Quality
10436	Peir Cardin	2	I saw it in a magazine
10438	Jordache	2	Looks similar to what I've seen in store
10440	Samsonite	2,5	The way it looks P good quality
10442	Samsonite	9	Common brand of luggage. It's the only brand I know.
10445	Samsinite	4	The material is light easy to travel in. Tough material
10448	Samsonite	3	Stitching, leather, airy feeling.
10507	Tote	5	It looks like their quality
10508	Samsonite	5	I think that the bag fits its class

10522	American Tourister	9	Thats what come to my mind
10524	American Tourister	9,5	They are one of the most common brands. It looks well made, and I consider theirs well made.
10526	ADDIDAS	2	Because they make their bags like that.
10527	Gucci	0	Because it's popular
10528	Samsonite	0	Because that is the name Brand
10529	American Tourister	2	I saw it on a comercial
10536	Samsonite	9	When I see luggage I see that most
10543	Hartmann	1	Only brand I buy.
10546	Hartman	5,1	Because it's good quality P I have one.
10547	American Airlines	2	We rented luggage from them and it looked just like this.
10548	American Tourister	0	Just Does (P) NE
11014	Pierre Cardin	1,2	Looks familiar, similar to what I brought
11015	American Tourister	4,2	Leather, style
11024	Hartman	1	Because I have one
11025	Hartmann	3	Same color as most Hartmann's and hook
12001	Hartman	2	Hartman made this type first
12002	Hartman	2	It looks like the Hartman I was considering
12003	Hartmann	1,3,4	I have a Hartmann wallet and it has some of the qualities like the finished leather the sewing & the padding.

12009	American Tourister	9	Just a mild guess - I really have no idea
12016	Calvin Cline	5	Has that designer look
12017	Tourist	5	Workmanship, quality
12018	Samsonite	3,2	It looks like the colors they use & style
12019	Ola Cassini	5	this is his type of design - quality stuff
12023	Sears	2	I looked at some just like this at Sears --I think they manufacture it
12024	Samsonite	4,5	Workmanship, fabric
12025	Shenon	2,5	Quality looking looks like that brand I've seen
13001	Hartmann	4	Its got the leather on it. I saw some others and they didnot have any
13002	Hartman	9,5	I don't know its the first thing that came to my mind. Its good stuff. (mean) High quality
13018	Oleg cassine	5	Cause its real leather
13019	Ralph Lauren	2,3	Because I worked at Dillaids and they had a sale on luggage and it looked like that. (w) The way it is made, the color and the style. No that's all
13022	Samsonite	9	Its the name I think of when I think of luggage. Without some kind of logo or recognition I can't tell what it is
13023	Landsend	4,2	I get the catalog and it looks like the ones in the catalog. The nylon and the leather it its leather.
13024	American Tourister	9	Thats the only thing I think of when I think of luggage and I'm not too educated on luggage
13025	Skyway	4	Because of the nylon material

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14002	Sampsonite	1	Because it is luggage I buy. You would probably say its because of advertising but thats not it. Its because the durability. It is durable! I have kids & they play & jump on it. It stands up.
14007	Hartman	4	They make alot of leather.
14023	Jordache	2	They have lot of luggage that looks like it. No other reasons.
14029	Hartman	1,5	We have a piece of HARTMAN luggage. I like it a lot - nice size - built well - functional. Would buy the FULL LINE if it were not so expensive. Good in every way.
14037	Cardin	4	Looks like good quality, leather, strong nylon fabric anything that has leather. stands
16003	Nordic	1	I DK - but I brought something that looked similar to that
16006	Samsonite	2,3,5	The way its made, the color, the handles, when I was looking at luggage the Samsonite pieces were like these.
16007	Sasoon	4,3	Because of the texture its the same color as mine & the same textures no
16011	Ralph Loren	1	I had a bag that looked something like it no
16012	American Tourister	2	If just looks like the ones that I saw while shopping for luggage
16026	Pierre Cardine	1,3	I have some the color is similar no
16045	Oleg Cassini	2	I just think I've seen this no
16046	Hartman	3,5	Leather straps looks like good workmanship, good lines & sturdy
16047	Samsonite	0	Because I remember the brand & when I was looking they had five or 6 of these

16048	Sasoon	4	The material its like the canvas type in a wet look no
16051	Sasoon	4	I feel one of the designers looks like one of the brand names like the nylon material & their leather trim.
18004	Sergio Valenti	3,5	It's made well with leather trimmings
18012	Samsonite	4	Cause usually it's samsonite with this much leather
18016	Samsonite	2,3	It looks close to samsonite (why) the stiching resembles samsonite (w/e) N/E
18027	Jordache	5	Just looks well made like Jordash (w/e) N/E
18034	Hartman	1,5	I have some that looks similar (w/e) well made stands up, you can tell its Hartmann Its stronger than most (u/m) stand up longer.
18042	Hartman	1,5	Its well made & looks like a Hartmann I bought. (w/e) N/E
19013	Maybe Hartman	1,2,4	I think I had one that looked like that, tan and leather. (w/e) That's it.
19016	Hamilton	4,3	Because of the leather bound, the way the leather is - (w/e) That particular color, they have those. (w/e) That's it.
19023	Hartman	5,2	It looks like it and there is the H to verify and it doesn't look like a knock off. (w/M) It is sturdy, the clasps are, it is well made.
19025	Halston	0	Because I saw the H on the zipper

(SRPX-4).

431. Some responses to question 3A appear to be miscoded with respect to the reason given for the identification in question 4. These

errors are detailed below:

Attaches:

Questionnaire	Error
30117	Should include code "2" for "seen it".
30124	Should include code "0" for "other".
30201	Code should be "2" rather than "5" since response need not relate to quality.
30220	Should include code "2" for shape.
30315	Response is tautological. Code should be "9" or "0".
30328	Response should include code "3", since the handle is a specific feature.

Attaches:(cont.)

Questionnaire	Error
30340	Code "5" should not be included since "different construction" does not necessarily relate to quality/durability.
34006	Should include code "2" for "looks it."

Carry-Ons:

Questionnaire	Error
20307	Code "0" should be code "5" which relates to quality.
20349	Code "9" should be deleted.
20423	Should include code "4" for leather.
20446	Code "5" should be deleted since construction does not necessarily relate to quality/durability.
21026	Should include code "2" for "looks it."
27009	Should include code "4" for leather.

Hanger Bag:

Questionnaire	Error
10218	Should include code "4" for leather.
10239	Should include code "Y" for "I don't know."
10433	Should include code "2" for "seen it."
10448	Should include code "4" for "leather."
10528	Should be code "9" for "brand name."
12016	Should be code "2". "Designer look" does not necessarily relate to quality/durability.
14002	Should include code "5" for "durability."
16003	Should include code "Y" for "don't know" since response is "DK."
16047	Should include code "9" for "brand name."

432. The 874 interviewees who did not associate the Hartmann piece with a specific manufacturer or brand name were asked question 4, viz. "Do you believe that [bag] which look like this are manufactured by one company or more than one company. Their responses, by type of luggage and total, are shown below (percentages with respect to the total number of interviewees associated with each luggage piece):

	One Company		More than One Company		Not Known
		percent		percent	
Hanging Bags -	58	14.5	245	61.4	1
Carry On - - -	39	9.5	247	60.2	0
Attache - - -	99	25.4	185	47.6	0
Total - - -	196	16.4	677	56.5	1

(SX-46, at 1, 3, 5, code 1-09; See Rappeport SRPX-3, Ex. 4).

433. The 874 interviewees were not asked basis for their answer. (CX-148).

434. 677 interviewees who identified the Hartmann piece with more than one manufacturer were asked a question 4A, viz. "Do you believe that [the bag] which look like this originally were manufactured by one company and then were copied by other companies or that [the bag] which look like this were never identified with one company?". Their responses, by type of luggage and total, are shown below (percentages with respect to the total number of interviewees associated with each luggage piece):

	One Company, Now Copied		Never One Company		Not Known
		percent		percent	
Hanging Bags -	173	43.4	70	17.5	3
Carry On - - -	161	39.3	81	19.8	2
Attache - - -	122	31.4	63	16.2	0
Total - - -	456	38.0	214	17.9	5

(SX-46, at 1, 3, 5, code 1-10; See Rappeport SRPX-3, Ex. 4).

435. The 677 interviewees were not asked the basis for their answers. (CX-148).

436. Some responses to question 4A appear to be miscoded with respect to the reason given for the identification in question 4. These errors are detailed below:

Attaches:	Questionnaire	Error
	30117	Should include code "2" for "seen it".
	30124	Should include code "0" for "other".
	30201	Code should be "2" rather than "5" since response need not relate to quality.
	30220	Should include code "2" for shape.
	30315	Response is tautological. Code should be "9" or "0".
	30328	Response should include code "3", since the handle is a specific feature.
	30340	Code "5" should not be include since "different construction" does not necessarily relate to quality/ durability.
	34006	Should include code "2" for "looks it."

Carry-Ons:	Questionnaire	Error
	20307	Code "0" should be code "5" which relates to quality.
	20349	Code "9" should be deleted.
	20423	Should include code "4" for leather.
	20446	Code "5" should be deleted since construction does not necessarily relate to quality/durability.
	21026	Should include code "2" for "looks it."
	27009	Should include code "4" for leather.

Hanger Bag:	Questionnaire	Error
	10218	Should include code "4" for leather.
	10239	Should include code "Y" for "I don't know."
	10433	Should include code "2" for "seen it."
	10448	Should include code "4" for "leather."
	10528	Should be code "9" for "brand name."
	12016	Should be code "2". "Designer look" does not necessarily relate to quality/ durability.
	14002	Should include code "5" for "durability."

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16003	Should include code "Y" for "don't know" since response is "DK."
16047	Should include code "9" for "brand name."

437. When Rappeport was shown CPX-3, identified by complainant as a Hartmann A9(A8) attache case and asked who made it he answered "Hartmann." When asked what made him identify Hartmann, he answered "On the metal clip of the lock, it says Hartmann luggage." He also stated that there is a label sewn in the attache case that also "identifies it as Hartmann" and a label "on the side" identifying the case as Hartmann luggage. (Rappeport Tr. at 743, 744).

438. Rappeport was shown an attache identified as CPX-32 at the hearing and asked who made the case. Rappeport, in misreading his witness statement CX-147), stated that the case was made by Hartmann. When the paper that covered the embossed name was removed, Rappeport testified that obviously it was not made by Starco but made by Starco from the name on the lock plate. He reached that conclusion from the name that was embossed on the lock flap and from reading the witness statement correctly. (Rappeport Tr. at 746, 747).

439. In the SURVEY Rappeport testified that there was a series of controls. The first of these controls was said to be question 3A "Why do you say that?" It was said that it was found that 4 to 5 percent of the people said they were guessing, in effect. Another control was said to be question 4 "Do you believe that . . . [bag] which look like this are manufactured by one or more than one company." Thus Rappeport testified that if there had been a suggestion in Question 2 "Can you tell me the manufacturer or brand name of this piece of luggage?" that there was a single brand name, then all would have answered "single company" for question 4. (Rappeport Tr. at 758).

440. The SURVEY did not determine when people first thought that more than one company had started to make a particular piece of luggage. (Rappeport Tr. at 758).

441. The pilot study in the SURVEY by definition refers to a small group of people. Rappeport testified that it had no statistical validity in and of itself presumably because of the small numbers and that it was done simply to see if questions had been formulated that get at the hypotheses which Rappeport testified were trying to be tested. (Rappeport Tr. at 760).

442. The SURVEY included the results of the pilot study because according to Rappeport the tests seemed to come out favorable to what was wanted. No word was changed between the procedures used in the pilot portion and the main portion of the study. (Rappeport Tr. at 760).

443. No significant variation was found in the results between the pilot study and the main study. However the sample error on a study the size of the pilot study is so large that it would have been very unlikely that there would have been found a significant difference with using the pilot study. The pilot study results were valid but not stable. (Rappeport Tr. at 760, 761).

444. The SURVEY according to Rappeport showed that the largest group of people looked upon the bags as having been copied and being marketed by more than one person. (Rappeport Tr. at 761).

445. In the initial stages of the SURVEY (Table 1 of CX-148), one-third saw a Hartmann case, one-third saw a Hartmann hanger case and one-third saw a Hartmann carry-on case. Rappeport reported on the average 7 percent across the three groups reported Hartmann as to the bag shown.

Seventy-three percent said they did not know who made the bag. (Rappeport Tr. at 761, 762).

446. Only 73 percent of the people interviewed were asked question 4. Then only 57 percent were asked Question #4A. Of the 57 percent who were asked question 4A, Rappeport reported that 39 percent said it was copied and 18 percent said it was never identified with only one company. (CX-148, Table 2; Rappeport Tr. at 763).

447. According to Rappeport, his conclusion that the Hartmann attache case, hanger bag and carry-on bag are known on the basis of the Hartmann look to a significant fraction of the luggage-buying public is based on a combination of the 7 percent that knew Hartmann by name and the 16 percent additional think that they are made by only one company. Rappeport also claims that a substantial fraction of the 39 percent who knew the bag was originally made by one company and now say the bag has been copied by a number of companies also say that they recognize the look as reflecting a specific kind of luggage. (Rappeport Tr. at 765).

448. Hartmann has in the neigborhood of a one percent market share in luggage. Hence when Rappeport stated a significant fraction he said he considered Hartmann's market share. He was of the opinion that nobody with 1 percent market share could have the identification Hartmann has unless people really recognized the Hartmann look. Rappeport testified that even if he only counted the people who could actually identify Hartmann, i.e. the 7 percent who say Hartmann, that still is a significant fraction from Rappeport's point of view given Hartmann's 1 percent market share and how little it should have. He testified that nobody with that market share could have that much identification unlerss people really recognized it. (Rappeport Tr. at 766).

449. With respect to how Rappeport concluded that four out of five persons interviewed believed that the particular luggage they saw was at least at one time identified with a single source, Rappeport relied on the 7 percent who said Hartmann plus the 20 percent who said somebody else, but think there is a single supplier plus the 16 percent who said it is just one company plus the 39 percent who said it was originally made by a company and now copied which gave a total of 82 out of 100 and a little more than 4 out of 5. Another way was to count only the 7 percent who said Hartmann, the 16 percent who said one company now makes it and the 39 percent who said it was originally made by a company and now copied (20 percent is eliminated because of uncertainty with respect to how the interviewees felt or because it is believed that they were induced) which results in a total of 62 percent out of 80 percent which is almost four out of five. Rappeport later testified as to the basis: 7 percent say Hartmann in answer to Question # 2 ands 3 while 20 percent named some other source and 16 percent in answer to Question # 4 knows a single source but the source is unknown and 39 percent in answer to Question #4A knows there has been copying. The total is 82 percent. The 82 percent is about four to five. Alternatively 7 percent say Hartmann, with the 20 percent there is some argument whether the people were guessing (although Rappeport does not agree that there was any guessing) and thus the 20 percent is put aside, the 16 percent know the single source but admit that they don't know the name and the 39 percent in answer to Question #4A say copiers. The total is 62 percent. There is only an 80 percent base and hence 62 over 80 results in about four out of five (to be exact 77.5 percent). Here the 20 percent is not counted in either the numerator or the denominator. In another approach dealing with the attache cases, 8 percent say Hartmann and with a 19 percent

there is some argument whether the respondents were guessing and thus the 19 percent was put aside, a 25 percent knows the single source but admit that they don't know the name and a 32 percent say copied. The base now is 81 and the numerator is 65 and it turns out to be a little over 80 percent. Also Rappeport testified that one could say at a very minimum that 7 percent say Hartmann and 16 percent knows a single but unknown source and when eliminating the 20 percent that may have guessed, the absolute lowest number for secondary meaning is 23 over 80 or roughly 30 percent. Alternatively one could say 39 percent said copied and 18 percent said noncopied which results in a base of 57 and 39 over 57 is about 70 percent. Rappeport testified that secondary meaning is demonstrated based on the facts that certain respondents know the absolute name of the maker i.e. Hartmann, certain respondents know there is a single source and they do not know the name of the maker and certain respondents know more than one company makes the item now, but that they believed it was first identified with one company and then copied. (Rappeport Tr. at 768, 887, 891, 892, 893, 894, 895, 896, 897, 903; CPX-45, 45 (1), (2) and (3)).

450. Rappeport testified that there is one reason that would not make the 7 percent figure reliable and that would be people who say that Hartmann is the only name they know. (Rappeport Tr. at 905, 906).

451. The SURVEY did not have a control built in for a line of questioning that would establish what income level people were purchasing or what income level these people had or whether they owned a house. According to Rappeport what is at issue is what fraction of the people interviewed refer to Hartmann. It is not the fraction of the high price Hartmann has. The universe was, in effect, everybody who goes through the kind of shopping

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centers used. It was concluded that that resulted in a pretty much of a cross-section of everybody who buys luggage. What percentage Hartmann has of the market over $150 is not considered, by Rappeport, relevant to the survey. (Rappeport Tr. at 789, 790).

452. According to Rappeport the following three nested hypotheses were set up because it was believed that the Hartmann look was better known than Hartmann and that therefore people would know a single company made the luggage even if they didn't know the name of the company because they had seen it: The company's known (people would identify Hartmann); I know it's a single source but I don't know the company or say a wrong name: I know it's been copied, but I know it use to be a single source. (Rappeport Tr. at 793).

453. Rappeport testified that if question #2 influenced people to believe that a single brand was the answer, since virtually everybody knows some brand, there would not have been obtained 73 percent of the people saying "I don't know." Rather the 73 percent would have guessed a name. (Rappeport Tr. at 800, 802, 828).

454. With respect to the source in the SURVEY for 4 percent guessing, Rappeport refers to the 4 percent who answered Question #3A with the comment "that's the brand I know." (Rappeport Tr. at 810).

455. With only the answers to Question Nos. 2, 3 and 3A that Rappeport received, Rappeport looked at the 7 percent who said Hartmann in answer to Question #3 in a vacuum. Rappeport testified that a survey of only Questions #2, 3 and 3A would have been incomplete. The SURVEY according to Rappeport has to be looked at in its entirety. Rappeport testified that if one relied on only Questions #2, 3 and 3A there would be 73 percent of interviewees one knew nothing about. (Rappeport Tr. at 832, 833).

456. What Rappeport testified that people mean by copying is not that one has the same thing as another and somewhere in the dawn of antiquity a person was the first one to do it. Rather the term "copy" means an intentional attempt to duplicate what something looks like. (Rappeport Tr. at 840).

457. According to Rappeport the issue of secondary meaning "always goes to design features. You can't get a secondary meaning in a functional feature, the way I understand it." (Rappeport Tr. at 846).

458. Rappeport does not know how many misterrepreted Question #4A of the questionaire. He did not do a control on that question to determine why answers were being given. However from his experience he does not believe that there is a 3 percent error. (Rappeport Tr. at 847, 848).

459. All the bags in issue have design and functional features. (Rappeport Tr. at 848, 849).

460. Rappeport testified that the way people answered the questions was not to isolate a particular feature of a bag but to look at the overall look and thast is "what we asked them to do and that's how people do behave." (Rappeport Tr. at 851).

461. Rappeport testified that Question 4A brought the total of secondary meaning and single source association up from approximately 40 percent to up to 80 percent or close to it. (Rappeport Tr. at 852).

462. Questions up to and including Question 4A with answers takes a short time - two minutes or a minute and a half. (Rappeport Tr. at 855).

463. Rappeport estimated that 4 percent of the population would tend to look at Question 2 as asking for a brand name. However he also testified that he doesn't know how many people, and that there is no way of

knowing how many people, thought that the Question #2 would suggest one company only. He did testify that 73 percent were willing to say no to Question #2; that if one believes Question #2 induces one to believe one company, Question #4 (viz. Do you believe (type of luggage) which look like this are manufactured by one company or more than one company?) induces one to believe that there is more than one company. Rappeport does not know how many people were led by Questions 2 and 4. He testified that in his judgment the combination of Question 2 and 4 leads toward more than one company for that fraction of the population, if any, who is influenced by the wording of the questions but that any leading effect of the questions was marginal. (Rappeport at 855, 856, 858, 859, 860, 868, 869, 881).

464. Question 2 is a closed question respondent has one of two choices to give); the combination of Questions. 2 and 3 are quite open, i.e. the respondent can give an answer without prompting. (Rappeport Tr. at 878, 880).

465. There is no control or check for Question #4A in that the respondents were asked why they so responded to Question #4A. There is a check for Question 3A because "[w]e were trying to be careful not to include people who were clearly guessing in 3." Question #3A is a check against the combination of Question Nos. 2 and 3. (Rappeport Tr. at 882, 883).

466. When Rappeport was asked whether one would have to examine pretty closely each of the 324 surveys where there is a response to see whether the multiple punch included for example a guess, Rappeport answered:

> A. One would have to go through in some detail, if the point of looking at it was to see exactly what they said. However, the nature of the guess responses, okay, which is column 9 - - people punched this 9 because that is associated with the name of luggage, I just heard the name Samsonite or whatever it is - - I without going through it, and I wouldn't guarantee there

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was no such case, in the nature of that response it's hard to believe it's going to be multiple punch, because that response really is exclusive of the other kinds of answers you can give.

467. Rappeport testified that Code 2 (Rappeport SRPX-3, Ex. 3), *viz*. "General shape, style, looks it, seen it", used in connection with responses to Question 3A, represent an overall look of the piece of luggage and that they are indicative of secondary meaning. According to Rappeport SRPX-3, Ex. 2, col. 1-08 Code 2 represents 11.2 percent of 1198 or about 40 percent of 324. Rappeport does not agree that "seen it" is a guess. "Seen it", according to Rappeport, is a good indicator that a respondent believes the luggage comes from one place and that it is a "good indicator of secondary source, in the sense that the hypothesis that one kind of secondary source is you know it comes from one place, but you don't know where." The codes, as Code 2, are a shorthand version to let people understand what it is that is being covered. The codes are not what the respondents said in totality. The interviewers do the coding from what is said. (Rappeport Tr. at 922, 923, 924, 925, 926).

468. In connection with the answer to Question #3A, Code 3, *viz*. Specific feature: hardware, straps, trim, handle, color, weight" which added up to 5.8 percent of the total respondents to the survey or about 22 percent of the 324, Rappeport is of the opinion that anyone who said that the luggage looks like a Hartmann or the trim is a Hartmann is identifying Hartmann as the source of the luggage which is what secondary source is all about. As such according to Rappeport the people are talking about the look and hence taling about tradedress secondary meaning. (Rappeport Tr. at 927, 928, 929, 930).

469. Rappeport testified that when an interviewee is asked what specifically is that trade dress and he answers a specific with a handle or he

states that it looks like it to me he is still saying the same thing; that "He's saying it looks like. Looks like is what I mean by trade dress. It's the design that identifies, and that's what looks like means. And in my judgment, as soon as you get into 3A that's all you're really able to do. He may not even know consciously why he knows it's a Hartmann. It's just subconscious to him. But that look is Hartmann, and that's what trade dress is about." (Rappeport Tr. at 929, 930).

470. With respect to Question #3A, Rappeport identifies Codes 1 (Have it, friend/relative has it), 2 (General shape, style, looks it, seen it), 3 (Specific feature: hardware, straps, trim, handle, color, weight), 4 (Material (tweed, leather, etc.), texture) and 5 (Quality/durability) with secondary meaning. Responses that included color and weight were not always counted. They were most of the time counted but Rappeport testified that he allowed for the fact that a few people simply said something like color and that was all they said and they were not counted. However Rappeport testified that most people who gave a feature gave multiple features and when color and/or weight was included with the multiple features those people were always counted. (Rappeport Tr. at 933, 934).

471. Weight meant to Rappeport how it feels when it is picked up. Was the bag solid. Rappeport states that some of the specific features of category 3 are more indicative of trademark "protectible secondary meaning, perhaps; I'm not sure that some are more indicative of secondary meaning than others. That is, a unique color is probably not protectible, but it still says who the - - it still has the secondary meaning." (Rappeport Tr. at 935).

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472. Rappeport testified that in the SURVEY he always allowed for an extra 20 or so people that realistically could be discounted. (Rappeport Tr. at 933).

473. With respect to question #3A, the Y column, viz. "don't know" (Rappeport SRPX-3, Ex. 3) is punched at 12 on Rappeport SRPX-3, Ex. 2. (Rappeport Tr. at 933, 934).

474. On Rappeport SRPX-3, Ex. 2 TOT is "Total," and "MP" is multiple punch i.e. it is a count of how many people have more than one punch in that column. The "MP" means that said respondents that are so coded gave an answer sufficiently extensive that they had to be coded in more than one category. Thus everyone of the respondents under "MP" is in at least two of the other columns from the coding. The 116 under MP in Rappeport SPRX-3, Ex. 2 for "1-08" is the summary of the respondents that had to be coded in more than one place. (Rappeport Tr. at 934, 948, 949).

475. The term weight in the response "Specific feature: hardware, straps, trim, handle, color, weight" to Question #3A means how the luggage feels when it is picked up. It is used in the sense that respondents were saying the luggage is solid, well made, and it looks like a Hartmann. It is not used in the sense that somebody picks the luggage up and weighs it. Rappeport agrees that in the categories for Question 3A some of the specific features "are more indicative of trademark protectable secondary meaning, perhaps; I'm not sure that some are more indicative of secondary meaning than others. That is, a unique color is probably not protectible, but it still says who the - - it still has secondary meaning." (Rappeport Tr. at 935, 936).

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476. The fourth category for response to Question #3A is code or column 4 which stands for "Material (tweed, leather, etc.), texture." Rappeport represented that 5.8 percent of all 1,198 respondents stated code 4. This translates into 21 percent of the respondents responding to Question 3A. "Material (tweed, leather etc.), texture" is all indicative of secondary meaning in terms of general looking appearance. Almost all of the respondents who so indicated code 4 were counted as indicating a secondary meaning. (Rappeport Tr. at 939, 940).

477. The fifth category for response to Question #3A is code or column 5 which stands for "Quality/durability." Rappeport represented that 6.6 percent of all respondents or 24 percent of those respondents answering Question #3A stated code 5. Almost all respondents who so indicated code 5 were counted as indicating secondary meaning. (Rappeport Tr. at 940).

478. Code or column 9 is the category for response to Question #3A which stands for "Associate the name with luggage, heard the name, name comes to mind." Rappeport represented that 2.7 percent of all respondents or 10 percent of those respondents answering Question 3A stated code 9. The answer indicated guessing. The respondents so answering should have been pulled out of the numerator and denominator for arriving at the about 4 out of 5 estimate. However they are such a small percentage that they will not materially affect the result. They were not pulled out at the time the report (CX-148) was written because Rappeport was trying to give a clear, clean view which he understood he would have to elaborate. (Rappeport Tr. at 940, 941, 942).

479. With respect to sampling error and illustrating with code or column 2 as to Question #3A (Rappeport SRPX-3, Ex 2), there was 11.2 percent

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of all 1,198 stating that category, or 41 percent of the respondents responding to Question #3A. The proper base is the 324 people answering Question #3A. On that base, at the 40-some-odd-percent mark, the error is about plus or minus 5 and hence it is 41 plus or minus 5, i.e. between 36 and 46. It doesn't mean that an error was made. (Rappeport Tr. at 846, 947, 948).

480. Referring to Rappeport SRPX-3, Ex. 2, for "1-07" 82 respondents were coded 1 and these were in fact people saying "Hartmann." One person, who is multiple punched, insisted on giving two answers. From a statistical point of view Rappeport stated that this was meaningless. (Rappeport Tr. at 951).

481. The purpose of Question #3A, according to Rappeport, was to be able to get some measure of those people who are simply guessing in responding that that is the only luggage name they knew. Thus the purpose of Question #3A is to distinguish whether the respondents are responding with a brand name because that is the name they know or because of what the bag looks like. (Rappeport Tr. at 953, 954).

482. In the REPORT (CX-148), there is not discussed guessing in terms of recording the significance of secondary meaning in the conclusions of the REPORT. Also there is not discussed multiple punches but Rappeport is of the opinion that if he had discussed multiple punches it would have strengthened the report. The sample error was not discussed but according to Rappeport the sample error tables are standard. Sample error can become significant when one is taking about numbers like 7 percent. (Rappeport Tr. at 954, 955).

483. With respect to the pullman case in issue, complainant's counsel represented that when the survey was done there was no active

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respondent for the pullman and the pullman was not used in the survey. It is complainant's position that since there is such a clear connection between the attache case and the soft pullman it is reasonable to extrapolate the attache case data to the pullman. (Tr. at 966, 967).

484. With respect to raw survey 35007, Rappeport testified that the response was that the name was known and the name of the manufacturer is Hartmann; that it is thought my brother has one and the respondent has seen one styled like the one shown. Hence it was coded 1 and 2 because the 1 code had to do with the brother having one and the styled like that was coded a 2. Rappeport believes that most people who have been coded 1 and 2 are clearly showing that they recognize the look. (Rappeport Tr. at 977, 978; SRPX-4).

485. With respect to raw survey 35021, the respondent said Samsonnite when he looked at the luggage. Rappeport testified that this was coded as zero for "Other:" that it could have been coded a nine although it was decided that "look at that type of luggage, it is sufficiently ambiguous that we coded it in that small number of people called "Other." The "P" in parenthesis is the interviewer's shorthand for saying again what makes you say that - it is the interviewer probing. Rappeport testified that raw survey 35021 could have been coded as a guess or it could have been coded as a zero. (Rappeport Tr. at 979, 980).

486. With respect to raw survey 35030, it was coded a "Y" because the respondent did not know why the respondent called it a Samsonite. (Rappeport Tr. at 980).

487. Raw survey 35034 was coded as "Members only." which is a brand name put under category of "other" because it is "about the only one we found like that and he says it's a label on the luggage, and of course there were no

labels on any of the luggage, certainly not one that said Members Only, and was coded as an 'other'. The answer was included in the general sense as part of secondary meaning "But one can argue again on that kind of thing." (Rappeport Tr. at 981).

488. With respect to raw survey 35044 in response to Question #3, interviewee answered "Samsonite" and it was coded 2 which was included in secondary meaning. In answer to Question #3A it was stated "It looks like Samsonite luggage." When asked why the survey was not coded as a guess, Rappeport testified:

> A. Because it looks like - - it's what the whole case is about. I mean, everything is a guess if they get the wrong answer in the sense they didn't say Hartmann, but looks like is what the case is about, so it's not a guess in that sense.

(Rappeport Tr. at 981, 982).

489. With respect to raw survey 35046 in response to Question #3, interviewee answered "Samsonite" and it was coded 2. The answer to Question #3A was that it looks like a quality product and that is what I think of when I think of them and that was coded a five. Rappeport testified that it was stated that it's a quality product and again it was said "looks like" which in Rappeport's sense was not a guess. (Rappeport Tr. at 982).

490. When asked "So, if they said Samsonite and the reason they said Samsonite was becase it looked like a quality Samsonite to them, that is secondary meaning for Hartmann's attache case?" Rappeport answered:

> A. No, that is secondary meaning from the point of view that they believe it comes from a single source. It is for the lawyers to argue about whether that secondary meaning is for Hartmann's case. I was asked to find out whether people thought it came from a single source because of its look. I may be mistaken about what the look is."

(Rappeport Tr. at 982, 983).

491. As to raw survey "25007", the answer to Question #3 is Samsonite and the answer to Question #3A is "the style is similar to these products." Each of the answers to Question #3" and Question #3A was coded 2. It was coded 2 because "we are taking about general look." (Rappeport Tr. at 985).

492. With Respect to the raw surveys, Rappeport testified:

> THE WITNESS: The next one [25019] is Hartmann. They only work in leather. They only use - - and I'm sorry, I can't read the copying of that word - - of nylon material.
>
> I would have to guess it's that type of nylon material. We coded that a four for material, which is the code sequence, and a one for Hartmann of course because that is a brand name.
>
> BY MR. GERTLER:
> Q. And because they used that type of nylon, that is indicative of secondary meaning?
>
> A. No sir. What is indicative of secondary meaning is that they recognize this case. Whether or not they can specifically explain why they are recognizing this case, they claim to recognize the case.
>
> That is - - and they did recognize it as a Hartmann. The person didn't claim to have bought a Hartmann. This person claims only - - and they certainly therefore are in the low incidence of people and they still recognize it from a certain kind of workmanship and material, overall look.
>
> And, yes, I claim that such people are in fact demonstrating that they recognize Hartmann, when you have a brand with this kind of level of recognition and they give me some things about how it looks which is what they are talking about.
>
> Now, I think they are recognizing the look.

(Rappeport Tr. at 985, 986).

493. The testimony was:

> Q. So, again we have a Hartmann piece here, CPX-9. If they are going to identify for you the nylon, the leather, the hardware, the weight, those kind of things, that's going to be sufficient for secondary meaning.

> A. They're done that and said it was a Hartmann without any other indication. That is - - what I'm saying is that people don't go through a detailed set of things about what the look is.
>
> What they're telling me is, here's this bag. It's got one percent of the market. I don't even own one. Well, that's because people who own one say it. I don't own one, I look at this bag, that's the way a Hartmann looks to me.
>
> There's a whole set of features that go with that. Some of those features the Court may hold protectable. Some of them they may not. But in case the Hartmann is made - - and Mr. Davis was clear about this - - I thought yesterday, it's the combination of things that creates a look and I believe that is what these people are answering because that is how human beings answer this kind of question.
>
> Nobody, not knowing about this case, is going to say, well, there's a combination of features that creates a look for me. That is not just how the human being is going to answer that.

(Rappeport Tr. 986, 987).

494. Rappeport testified that there was not a person on the survey in Minneappolis that mentioned a specific feature with respect to a attache case. (Rappeport Tr. at 991).

495. Referring to raw survey 25026, the answer was Samsonite and hence was coded a four. It was coded a five because it was said it looks like good quality and it just looks sturdy.[15] (Rappeport Tr. at 993, 994).

496. As to raw survey 25027, in answer to question #3, "Sassoon" was given and it was coded a "7;" the answer to question #3A was "Because of the leather . . . it just looked at some luggage, and it had leather" and it was coded "2, 4." Rappeport testified that now "we're agreeing that the Samsonite people are confused as to which one they have. It is seen as secondary meaning." (Rappeport Tr. at 993).

497. People in Minneapolis who said it looks like Samsonite were put into the 20 percent percent in that the people know a single source or claim to know a single source and don't know the name. (Rappeport Tr. at 994).

498. As to raw survey 19025, the answer to Question #3 was "Halston" and it was coded a "0;" the answer to Question #3A was "Because I saw the H on the zipper" and it was coded a "0" for "Other." The "other" was kind of a catchall category. (Rappeport Tr. at 996).

499. Rappeport would classify K mart as appealing to a midscale market. K mart is above Sears and above all discount stores. (Rappeport Tr. at 998, 999).

500. Rappeport testified that reading together Question #2 and Question #4, if there is an influence as to an answer, the combination of those two questions is to influence one to believe that there is more than one company because that is the unusal, and not the usual, idea, i.e. people look for the unusal idea if they are being influenced by questions. The unusal idea was said to be that there is more than one company involved. (Rappeport Tr. at 1001, 1002).

501. Rappeport testified that people do not have very strong views about who makes a specific luggage. (Rappeport Tr. at 1003).

502. Rappeport testified that if the answers to Question #3A that gave a name other than Hartmann, i.e. 20 percent, were discarded there would not be any material change in results. (Rappeport Tr. at 1027, 1028).

503. One Hartmann vinyl attache and one Hartmann fabric attache were used for the entire survey and in one set there was displayed the vinyl alone and in the other set there was displayed the fabric alone. (Rappeport Tr. at 1041).

504. According to Rappeport, "copied" means that the luggage was originally identified with one manufacturer and then copied which is in

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contrast to luggage always being made by a bunch of people. (Rappeport Tr. at 1042).

505. By Question 3A, Rappeport testified that he was trying to sort out as much as they could those people who were purely guessing or who were guessing explicitly because that was the luggage they knew. "Guessing" means to Rappeport that he only knows a luggage company or he only knows two luggage companies. A question of the type Question 3A was not asked after Question #4. Rappeport testified that guessing is not a meaningful thing with regard to Question #4 and that Question #4 involves a belief. (Rappeport Tr. at 1044, 1045).

506. Rappeport testified that 57 percent (a majority) at the time of the interview thought that the luggage was not made by a single company. (Rappeport Tr. at 1046).

507. When asked whether the SURVEY sorted out features which are protectable as opposed to those features which are not protectable, Rappeport testified:

> A. We were looking whether people thought there was a single source or origin. We are willing to stand on the fact that they can't tell the bags apart because of the look. If you are going to argue that it is the functional features of that bag that make it impossible to sort out, I can't really say the survey will prove that that isn't true, and I don't know how any survey could, at least none that can be done within a reasonable constraint, without spending an awful lot of leading time on questionnaires. (Rappeport Tr. at 1047).
>
> Q. So that there is no way we can tell from your survey - - and I don't mean this as a criticism of the survey at all. But there is no way we can tell from the survey whether people focused on functional features, which the law does not protect?
>
> A. No. We do have 3A. The interesting thing is that where we do have any evidence, they keep talking about the look of it, the look of it. Some parts of the look my guess is the law won't protect. But general look, which I think is what most people were talking

> about, in fact we do have good evidence that says that the great majority of the people that said Hartmann were talking about the overall look of this case.
>
> The real point about that is that we then go on in confusion, and literally people can't tell the cases apart, not because they have the same functional features. I guarantee you that if I simply showed people three attache cases, that really one was round and one was square and one, to use the Judge's terminology yesterday, looked like a hat box, and I had shown them one that was a Hartmann that was square one, they would pick out the square one as being the Hartmann.
>
> The functional features of this thing are - - I think there is strong evidence from the confusion between them that it is the look that is confusing people. And the look, if I understand, overall look, not any particular feature, that is what I understand trade dress in the final analysis to be.
>
> I look at that bag and I have a source of origin associated with it. Not I see that that bag has a lock on it, therefore it's Hartmann. That's not what they said. They said it is the look of it, not the function.
>
> Q. Then it comes down to the question that, if the two things look alike, you find there is the confusion?
>
> A. I think if you're talking about trade dress, if they don't look alike there shouldn't be any confusion, and if they do there should. That's the definition as far as I understand.
>
> Q. Well, let's leave out the legal definition.
>
> A. I'm not talking about legally. I'm talking about as a survey researcher. I'm talking about confusion as to looks. It's whether they look alike, and that's what we're talking about, confusion as to looks

(Rappeport Tr. at 1047, 1048, 1049).

508. Question #3A gave some explicit answers. (Rappeport Tr. at 1049).

509. In answer to Question #3A 4.3 percent of the total sample of 1,198, regardless of the bag that was being talked about, stated "I have it or a friend has it, a relative has it, or I bought it for my daughter, those kinds of things. That is, actual ownership." A 11.2 percent listed general

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shape, style, looks, they'd seen it; 5.39 percent responded on specific features, hardware, straps, trim, handle, color, weight and others; 5.6 percent answered material and texture; 6.6 percent answered quality and durability and things like that, construction and so on. (Rappeport Tr. at 1050, 1051).

510. Headings on Rappeport Deposition Exh. 3, which is the key to Rappeport Deposition Exh. 2 (SRPX-3) represent the nature of the response to Question #3A in shorthand form. (Rappeport Tr. at 1051).

511. A 27 percent identified the bag with a particular manufacturer or brand name. The first three entries of Rappeport Deposition Exh. 3 in answer to Question #3A gave a total of only 21.3 percent so at least 5.7 percent based a selection on some other factor and this can be due to multiple punches. If the remaining factors, viz. material, texture, quality, durability, heard the name, the name comes to mind, something of that sort are excluded as a factor, the figure of association with the name would drop from 27 to 19 or 20 percent allowing for multiple punches. (Rappeport Tr. at 1052, 1053).

512. There were 389 of the total of 1198 respondents who were shown attaches in the survey. (Rappeport Tr. at 1053, 1054).

513. With respect to attaches, Rappeport testified that 10.5 percent based as answer to Question #3A on general shape, style, looks etc.; 8.2 percent based their decision on quality and durability; the next largest group based it on material, tweed and leather; and the next group based it on some specific feature which may have included color and which could include weight. (Rappeport Tr. at 1054, 1055).

514. Rappeport assumed that what people meant by straps on an attache case was the lock strap; the trim referred to the general overall look of the attache case, how it is designed. (Rappeport Tr. 1055, 1056).

515. Rappeport testified that if it is considered that the 20 percent who said they knew the name of the company and then did not say Hartmann presents insufficient evidence and the 20 percent is not used, there results a somewhat smaller universe. (Rappeport Tr. at 1063, 1064, 1065).

516. Rappeport testified that CPX 45-1 without the 20 percent decreases from 82 to 77 percent with respect to secondary meaning. (Rappeport Tr. at 1068, 1069).

517. The survey study was validated. (Rappeport Tr. at 1086).

518. A very standard statistical formula was used to determine sample errors. The formula is 1.95 the square root of PX over N. The sample error is a function of sample size with the biger the sample size, the smaller the sample error. It decreases not with the sample size but with the square root of the sample size. (Rappeport Tr. at 1093).

519. Dr. Daniel L. Kegan was accepted as respondent Starco's expert on market surveys. (Tr. at 1111-1129).

520. Kegan testified given all the other problems with the SURVEY, he would not be bothered by Question #4 by itself. He testified that Question 4A of the questionnaire was a leading confusing question. Question #4A is not a reliable question. Kegan was hired to determine whether the SURVEY was a reliable report. (Kegan Tr. at 1153, 1154, 1158).

521. According to Kegan Rappeport in his report makes no attempt to perceive consumer views on trade dress in 1982. Respondents could have been asked whether anything had happened in the last year that has changed

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respondent's information or attitudes towards the luggage. (Kegan Tr. at 1161, 1162, 1163).

522. Kegan believes telling somebody that a bag is Hartmann, which is a word mark, in the middle of the survey before one asks the person some key questions fatally flaws the report. (Kegan Tr. at 1168).

523. According to Kegan instructions were not followed in various ways by the interviewers. Kegan agreed that if he had to forget about all the other major problems of the SURVEY the wording of the questions did not occupy a lot of his attention. (Kegan Tr. at 1172).

524. Kegan testified that a probe should be after every important question in a survey of the type conducted under Rappeport. He believes that Rappeport put much more reliance on Question #4A than he did on Question #3 and hence the probe (Question #3A) in the SURVEY was in the wrong place. A probe should have been placed after Question #4A. The questionaire states "probe thoroughly." According to Kegan this means that an even moderately experienced interviewer keeps using that phrase "what makes you say that?" An interviewer keeps probing until a satisfactory answer is believed to be obtained. Kegan also testified that if you don't give an interviewee the choice of "I don't know" for an answer, the interviewer will get many fewer people saying they don't know. (Kegan Tr. 1174).

525. Kegan testified that it was his opinion, with respect to sequencing, that if the resources of the client only allowed one "why did you say that" type question, then that question should have been after the most important data which Kegan believed Hartmann felt was Question #4 and that if the resources are there an additional probe should have been used after Question #3A. (Kegan Tr. at 1179, 1180).

526. Kegan had problems with the wording of Question #2 by itself. He testified that Question #2 leads towards getting a particular name if one

can come up with one from one source and that to some extent it implies that there is a particular manufacturer or brand name for that piece of luggage. He did not see major problems with Question #4 by itself. (Kegan Tr. at 1189, 1190).

527. Kegan had problems with Question #4A in that it did not make sure that all possible responses one can think of is set out. In addition the question is a multiple question. Also neutral questions should be used unless for some reason it is desired to slant the data or lead the respondent. The word "copied" in Question #4A made it a loaded question. Also Kegan referred to the use of the term "identified." His opinion was that identification is different from manufacture. He testified that a fairer question would have involved breaking up Question #4A into two parts. One part would be a belief whether carry on bags which look like the bag shown were originally manufactured by one company and then were made by other companies or that carry on bags which look like the bag shown were never manufactured by one company and a separate part or question would be identification. (Kegan Tr. at 1190, 1191, 1192).

528. Kegan testified:

> A. On the issue of summing percentages, summing the answers for three different categories of people, I believe that is on the questionnaire, what you are talking about, and I have dealt with numbers a lot. I still find them at times confusing, and when I can I try to go back to what is concrete, to what did people say, what is on the questionnaire before it gets punched into a whole bunch of numbers, and there are a lot of errors that go on in general, and sometimes they are fixed. Here there are a lot of errors in the numbers. In fact, I know the numbers are not reliable. I know that on a lot of bases. . . .

(Kegan Tr. at 1198, 1199).

529. With respect to the question "How do you interpret the meaning or importance of Question 4 in terms of determining secondary meaning" Kegan testified:

> A. You get some indication of a person's belief about whether a bag that looks like this one is manufactured by one or more than one company. If it is manufactured by one company it does not necessarily have any source indicating significance about it. We are talking about manufacture, not about whether anything is distinctive about it.
>
> The other issue is whether they actually have a belief about this before or not [before]. If they don't have a belief and you ask somebody a question like this they are likely to give you an answer even though they don't know they have a belief, and there have been some very nice studies that test that out.
>
> Q. Does one know the extent to which persons responding to Question 4 have been influenced, if they have, from Question 2?
>
> A. Well, Question 2 implies that there is a manufacturer or a brand name for this piece of luggage. So in focusing on that one, in terms of whether they believe bags are manufactured by more than one company or just one, on the face of it with those two questions I can't tell that there is any relationship. I can't tell on the face of the survey. On the face I can't tell if Question 2 influences Question 4 on the belief of whether bags are manufactured by one or more than one company. There are ways to test that, but looking at the face of the survey I can't tell.

(Kegan Tr. at 1209, 1210).

530. Kegan further testified:

> A. If you say I will add 60 percent people who believe there is secondary meaning source indicating significance because 16 percent say in answer to Question 4 that they believe cases that look like this are manufactured by one company that forgets about whether they are responding to protectable or unprotectable items, that forgets about whether there is anything distinctive about that. It just says how they think manufacturing is distributed in the world, in the United States on that item. Nothing about distinctiveness, nothing about secondary meaning. Those are separate items.
>
> If you want to understand how many people think it has secondary meaning, you can go to what secondary meaning is. How many people think there is distinctiveness there? How many people think there is

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> protectable distinctiveness? If somebody thinks all they know is, they only know one company that makes suitcases, if it has a handle and a box, it is a suitcase that is made by this company.
>
> My understanding is, that is not protectable secondary meaning and I don't know what they are responding to when they say Number 4. I don't know why. If I had a probe I could answer a lot of those questions. I could say this one, yes, that is source indicating significance. It is a protectable source indicating significance. And this one, no. I think that is something else. I don't have a probe. I don't know what is going on. The burden of proof isn't carried.
>
> Q. And you said that Question 4A is leading. Is that correct?
>
> A. A bad, unuseful question if you really want to find out what people believe about it.
>
> Q. Believe about what?
>
> A. If you want to find out people's beliefs either about how many companies manufacture the bag or their beliefs about identification of companies, it is a bad question for either of those issues. It is probably a bad question, too, about finding out about copying. There are three different issues in one question. It is a multiple question that forces mose respondents to give one answer when there are three different issues.

(Kegan Tr. at 1213, 11214, 1215).

531. Kegan testified that Dallas and Chicago seemed out of the ordinary with respect to the high percentages (24 and 27) that identified luggage as a Hartmann luggage in comparison with an identification in other cities. Kegan is highly confident that unreliable things were happening in Chicago that makes him suspect Dallas. (Kegan Tr. 1224,1225, 1226).

532. Kegan testified:

> A. I don't believe I said it was unfair to show an attache case with a zipper. I said that it showed up in at least two surveys that the initial H was visible and to at least two respondents obvious. It created serious, serious doubts about reliability. I'm not talking about fairness. I'm talking about reliability. There's an important difference, and that difference was confused yesterday.

(Kegan Tr. at 1228).

533. Kegan testified that there were things that were done early on that could have been looked at and that it is a question of using your resources wisely to get a fair, reliable survey or trying to throw money at places and think if you get enough numbers back you can make something out of it. (Kegan Tr. at 1244).

534. According to Kegan the SURVEY has several fatal flaws that render its data untrustworthy - thus most importantly, the wrong issue was addressed; leading and biased questions were used; the data do not support a generalization to the purchasing universe as claimed; and multiple data recording errors impeach the reliability of the entire study. It is said that that study makes no distinction between protectable trade dress and nonprotectable elements, including functionality; that even if 90 percent of the relevant purchasing public believed that Hartmann was the sole source for boxes with handles to carry clothes, this would not evidence protectible trade dress for suitcases; that while Rappeport's consistent opinion is that his study evidences substantial confusion as to source of the respondent bags, this is confusion in the marketplace and not confusion caused by a respondent by false designation of origin. Kegan testified that Rappeport failed to account for the general background noise and confusion the public has about any topic and that good research would include control questions for such background confusion. (Kegan RX-12 at 6, 7).

535. Referring to raw surveys 10201 to 10250, Kegan testified that none identified any particular protectable element of trade dress and that typical is 10208 which read "It looks like something they [Samsonite] make." He also testified that the Rappeport study attempts to measure marketplace

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confusion during 1986 while the legal question concern purchaser perceptions in 1982 and 1983. (Kegan RX-12 at 7).

536. Kegan testified that after the questions about the first bag are asked, the interviewer is instructed to inform the interviewee that "The luggage I just showed you is Hartmann luggage;" that question #6 mentions Hartmann's name six additional times, twice to each of the three bags; and that informing interviewees of Hartmann's name perverts the survey. (Kegan RX-12 at 9).

537. Kegan testified that Rappeport selected his interview sites from a group of shopping centers "selling goods of the quality of Hartmann luggage. Hartmann is a high quality product advertised to and aimed at a so-called up-scale market" (Rappeport CX-148 at 3); that the Rappeport study universe is not the luggage purchasing public, but the affluent luggage market; and that Hartmann has provided no documentation of the originial enumeration of the shopping center universe nor of the random sampling procedure used (rasndom number table, stratified random sampling etc.). (Kegan RX-12 at 9).

538. Kegan testified that little information was supplied concerning the interviewers used in the Rappeport study; that although the questionnaire for question #3A explicitly instructed interviewees to probe "what makes you say that," few of the recorded answers evidence probing anywhere near appropriate for a trade dress/trademark study; that the interviewers were not full time professionals; that in the first "two bundles of surveys checked" 3 percent of the questionnaires had no mark for gender of the interviewee; that the evidence shows use of the rubber stamp lines, editing and no validation which directly contradicts Rappeport's claim that "a

minimum of 10% of each interviewer's work in each mall was validated;" that [although Rappeport asserts that the "three bags labeled A, B, and C were presented in a rotation pattern, beginning with the letter with an asterisk (*) on the questionnaire, many questionnaires had no asterisk;"] that no question 5 asterisk increased a "Hartmann" response; and that interviewee 10925 saw the H on the zipper. (Kegan RX-12 at 12, 13, 14).

539. Kegan testified that the Rappeport study fatally failed professional reliability on six criteria of Manual for Complex Litigation (Clark Boardman 1982): universe definition, sample selection, questions, data recordation, professional standards and interviewer professionalism. (Kegan RX-12 at 14).

540. Kegan testified that additional evidence of poor research supervision is the typed error on some of the attache case interview sheets i.e. in Question #4A "attache cases" was written in by hand and the typed words "hanger bags" were crossd out. Also no data table in the Rappeport report was said to list explicitly the number base for the percentages given and that in certain tables the data for two separate respondents is merged. (Kegan RX-12 at 15). (Comparison etc.)

541. The percentages of the 1,198 interviewees who identified the piece of Hartmann luggage shown them with a specific company were as follows:

Total	Carry-On	Attache	Hanger
27.0%	30.2%	27.0%	23.8%

(CX-148, at 6; SX-46, at 1, 3, 5, Code 1-07).

542. In his table concerning the identification of a piece of luggage with a single source (Table II), Rappeport included all interviewees who, in response to question 3, identified a specific company. Rappeport

included these interviewees regardless of the reason given in question 3A for such an identification. (Compare CX-148, at 6 with SX-46, at 1, 3, 5, codes 1-07 and 1-08; SRPX-3, Rappeport Exhibit 2).

543. If only the interviewees who had identified the luggage with a specific company because of: 1) "Have it, friend/relative has it; 2) general shape/style, etc.; 3) a specific feature, are included in the Table II results of specific company identification (Question 3), the results would be as follows for specific source identification:

Total	Carry-On	Attache	Hanger
17.6%	21.2%	17.0%	14.5%

(SRPX-3, Rappeport Ex. 2, at codes, 1-07, 1-08; SX-46, at 1, 3, 5, Code 1-08; FFs re: responses).

544. Interviewees to question 3A of the Rappeport survey that named at least one of the specific trade dress features claimed by Hartmann (square look, lock flaps, handle, outside valance, "Hartmann look") as a reason for identifying the piece of luggage shown them (whether with Hartmann or another source) are as follows:

Attaches------	28	of	105
Carry Ons-----	27	of	124
Hanger Bags---	15	of	95
Total-------	70	of	219

Attache questionnaire responses 30101, 30103, 30104, 30106, 30117, 30211, 30216, 30223, 30224, 30228, 30230, 30242, 30243, 30248, 30302, 30325, 30328, 34021, 34029, 34030, 34031, 35007, 36009, 36011, 36046, 37013, 37032, 37033.
Carry On questionnaire responses 20114, 20314, 20319, 20321, 20327, 20328, 20339, 20410, 20414, 20417, 20419, 20423, 21023, 21024, 21025, 21026, 22001, 23003, 23025, 25019, 27016, 27030, 27036, 27044, 28018, 28035, 28044.
Hanger Bag questionnaire responses 10209, 10240, 10543, 10546, 11024, 11025, 12001, 12002, 12003, 13001, 14029, 16046, 18034, 18042, 19013.

545. If only the interviewees to questions 3 and 3A who had identified a specific company in conjunction with a specific trade dress feature are included in the Table II results of specific company

identification, the results are as follows for specific source identification:

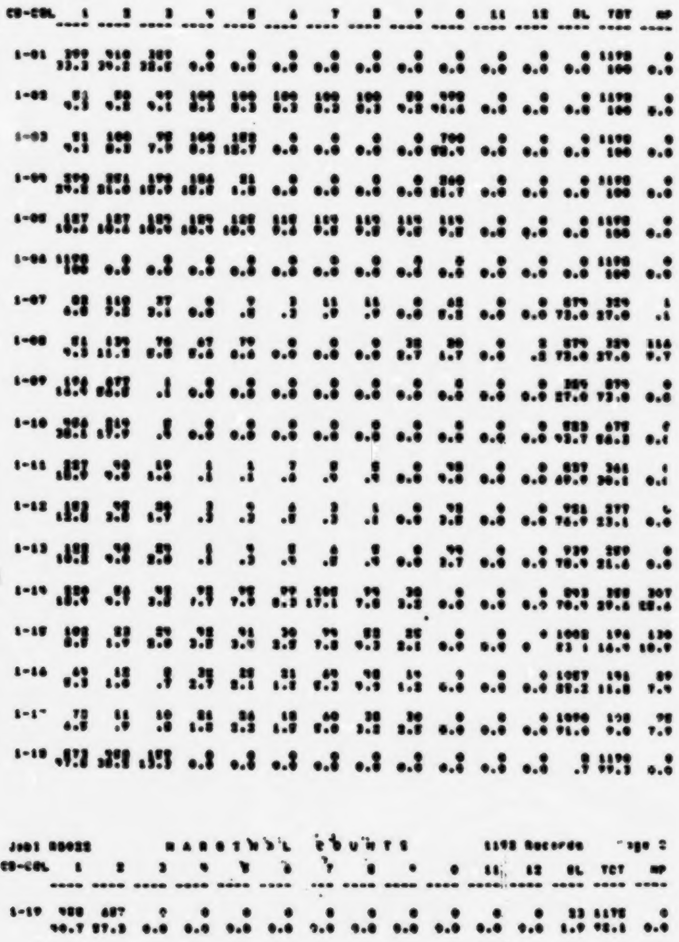
Total	Carry-On	Attache	Hanger
5.8%	6.6%	7.2%	3.8%

(SRPX-4; CX-148, at 6).

546. The interviewees were not asked the basis for their answers tc question 4A. (CX-148 at 6).

Confusion Results

547. Rappeport reported the summary results for all interviewees in the following summary table:



(SRPX-3 Rappeport Dep. Ex. 2).

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The above (Rappeport SRPX-3, Ex. 2) is the overall marginal account for the three types of luggage involved in the SURVEY. The numbers on the left side, i.e. "1-01," "1-02" etc. refer to the columns where the data was punched in. To determine the meaning of "1-01," "1-02" etc. the column guide (Rappeport SRPX-3, Ex. 4) has to be examined. The column guide shows that "1-08" refers to answer to Question #3A. The "m" next to ""1-08" means that the column may be multipled punched, i.e. that there may be more than one code in that column for a specific interviewee. The particular columns on the marginal account that are recorded with respect to Question #3A and 1 through 5, 9, Y and 0. (Rappeport Tr. at 916, 917, 918). In the above table code 1-11 (on the left) corresponds to question 5 in the questionnaire, viz. "I'm going to show you some more pieces of luggage. Can you tell me the manufacturer or brand name of this piece of luggage?" and refers to a Hartmann bag shown to interviewees. Column number "1" at the top of the table represents those interviewees identifying the Hartmann bag as a Hartmann. Column "2" at the top through "8" and "0", represents those interviewees identifying the Hartmann bag as coming from another source. (Compare Rappeport SRPX-3, Ex. 2 and CX-148 at 8-10; Rappeport SRPX-3, Ex. 4).

Codes 1-12 and 1-13 in the summary table also correspond to question 5 and refer to bags other than Hartmann shown to interviewees. Column number "1" represents those interviewees identifying the "other" bag as a Hartmann bag. Column numbers "2" through "8" and "0" represents those interviewees identifying the "other" bag as coming from a source other than Hartmann. (Compare Rappeport SRPX-3, Ex. 2 and CX-148 at 8-10; Rappeport SRPX-3, Ex 4).

548. Pages 8, 9 and 10 of the REPORT relate to confusion and purport to show that one cannot tell the bags apart. (Rappeport Tr. at 913).

549. The aggregate results from 1,198 interviewees asked question number 5 in the Rappeport questionnaire were as follows:

	Hartmann Bag		Other Bag "A"		Other Bag "B"	
	number	%	number	%	number	%
Identified as Hartmann----	227	18.9	153	12.8	122	10.2
Identified as other-------	134	11.2	124	10.3	137	11.4
Not identified------------	837	69.9	921	76.9	939	78.4
Total-----------------	1,198	100.0	1,198	100.0	1,198	100.0

(Rappeport SRPX-3, Ex. 2).

550. Kegan analyzed the accuracy of the results for question 5 in questionnaire numbers 10201 to 10250 (hanger bags), and determined that 19 of the 50 questionnaires (38 percent) contained coding errors. RX 100, at 16.

551. Rappeport's results from 399 interviewees asked question number 5 in the Rappeport questionnaire for hanger bags were as follows:

	Hartmann Hanging Bag		Mont. Ward Hanging Bag		Other Hanging Bag */	
	number	%	number	%	number	%
Identified as Hartmann----	55	13.8	40	10.0	36	9.0
Identified as other-------	38	9.5	32	8.0	44	11.0
Not identified------------	306	76.7	327	82.0	319	80.0
Total-----------------	399	100.0	399	100.0	399	100.0

*/ Kluge and American Guard It.

(SX-46, at 1-2, codes 1-11 to 1-13; SRPX-3, Rappeport Dep. Ex. 3).

552. For the hanger bag questionnaires, the codes for the individual pieces of luggage shown to the interviewees during question 5 were as follows:

Manufacturer Name	Code
Hartmann	Piece C
Montgomery Ward	Piece B
Kluge or American Guard it	Piece A

(SRPX-3, Rappeport Dep. Ex. 3)

553. An analysis of the coding used for question number 5 for the hanger bag questionnaires indicates the presence of coding errors. When the responses for the 399 interviewees are tabulated based on the above luggage codes, the results are as follows for hanger bags:

	Hartmann Hanging Bag		Mont. Ward Hanging Bag		Other Hanging Bag */	
	number	%	number	%	number	%
Identified as Hartmann----	66	16.5	31	7.8	34	8.5
Identified as other-------	29	7.3	34	8.5	45	11.3
Not identified------------	304	76.2	334	83.7	320	80.2
Total------------------	399	100.0	399	100.0	399	100.0

*/ Kluge and American Guard It.

Thus, while Rappeport concluded from his results above that two-thirds of interviewees were as likely to identify other hanger bags as Hartmann's as they were to identify the Hartmann hanger bag itself as a Hartmann, the correct results above show this number to be closer to one-half. (SRPX 3, Rappeport Dep. Ex. 3; CPX-35; CPX-36; CPX-37; CX-148, at 8; CPX-40 SRPX-4, Hanger Bag questionnaires).

554. If respondents could not identify any of the three pieces of luggage with a specific source, they were asked question number 6 in the Rappeport questionnaire, corresponding to codes 1-14 to 1-17 on the summary tables of results. This question dealt with the issue of why they could not identify luggage shown to them, and included four choices as follows:

a) You have no opinion as to the manufacturer of the luggage.
b) You cannot tell whether the luggage is a Hartmann product or whether instead its (sic) a copy of a Hartmann product.
c) You believe the luggage is a copy of Hartmann but don't know by who.
d) You have some other reason.

(CX-148, at 8-10, and "Interviewer Instructions"; SRPX-3, Rappeport Dep. Ex. 4).

555. For hanging bags, 59 percent of the interviewees did not identify any of the three bags shown to them. These interviewees were asked and responded to the following questions for each of the bags shown them (percentage using the total 399 interviewees as base):

	Hartmann		Kluge		Montgomery Ward		American Guard It	
	number	%	number	%	number	%	number	%
a) No Opinion as to the Manufacturer of the luggage	115	28.8	99	24.8	115	28.8	22	5.5
b) Cannot tell whether the luggage is a Hartmann product or a copy of a Hartmann product	52	13.0	30	7.5	54	13.5	20	5.0
c) Believe the luggage is a copy of Hartmann but don't know by whom	30	7.5	21	5.3	28	7.0	6	1.5
d) Have some other reason	36	9.0	18	4.5	36	9.0	17	4.3

(SX-46, at 2; SRPX-3, Rappeport Dep. Ex. 3; CX-148, at 8).

556. With respect to responses to questions 5 and 6 for hanging bags, Rappeport concluded that adding together those who identified another bag as a Hartmann and those who said either they "cannot tell whether the luggage is a Hartmann product or whether instead its a copy of the Hartmann product" (b) or they "believe the luggage is a copy of Hartmann but don't know by who" (c), between 30-35% of the respondents in each case demonstrated or said they were confused among the bags; and that in his opinion, this reflects s substantial degree of confusion as to source of origin of the challenged bags. Based on the correct results, and using the same methodology, this percentage would be revised to about 28 percent. (CX-148 at 8).

557. Rappeport's results from 410 interviewees asked question number 5 in the Rappeport questionnaire for carry-on bags were as follows:

	Hartmann Carry-On Bag		Kluge Carry-On Bag		Other Carry-On Bag	
	number	%	number	%	number	%
Identified as Hartmann----	62	15.1	28	6.8	33	8.0
Identified as other-------	58	14.1	62	15.1	57	13.9
Not identified-----------	290	70.7	320	78.0	320	78.0
Total------------------	410	100.0	410	99.9	410	99.9

(SX-46, at 3-4, codes 1-11 to 1-13; SRPX-3, Rappeport Dep. Ex. 3).

558. The above table would have to be corrected due to a coding error where eight attache questionnaires were miscoded as carry on questionnaires. A correction would result in following correct tabulation:

	Hartmann Carry-On Bag		Kluge Carry-On Bag		Other Carry-On Bag	
	number	%	number	%	number	%
Identified as Hartmann----	62	15.4	27	6.7	32	8.0
Identified as other-------	57	14.2	60	14.9	54	13.4
Not identified-----------	283	70.4	315	78.4	316	78.6
Total------------------	402	100.0	402	100.0	402	100.0

(SX-46, at 3-4, codes 1-11 to 1-13; SRPX-3, Rappeport Dep. Ex. 3; See SRPX-4, questionnaire nos. 26043-26050).

559. For the carry on bag questionnaires, the codes for the individual pieces of luggage shown to the interviewees during question 5 were as follows:

Manufacturer Name	Code
Hartmann	Piece C
Kluge	Piece B
Montgomery Ward or American Guard It	Piece A

(SRPX 3, Rappeport Dep. Ex. 3; CPX-28; CPX-30).

560. For carry-on bags, 56 percent of the interviewees had not identified any of the three bags shown to them. According to Rappeport, these

interviewees were asked and responded to the following questions for each of the bags shown to them (percentage using the total 410 interviewees as base):

	Hartmann		Kluge		Montgomery Ward		American Guard It	
	number	%	number	%	number	%	number	%
a) No Opinion as to the Manufacturer of the luggage----------------------	104	25.4	94	22.9	90	22.0	16	3.9
b) Cannot tell whether the luggage is a Hartmann product or a copy of a Hartmann--------------------	50	12.2	52	12.7	40	9.8	5	1.2
c) Believe the luggage is a copy of Hartmann but don't know by whom----------------	34	8.3	48	11.7	36	8.8	8	2.0
d) Have some other reason----	42	10.2	38	9.3	24	5.9	13	3.2

(SX-46, at 4; Rappeport Ex. 3; CX-148, at 9).

561. The above tabulation would have to be corrected for the fact that in two questionnaires (26044 and 26045) where the interviewees did not identify any of the three bags shown them, these questionnaires were actually attache questionnaires rather than carry on questionnaires. In addition, the percentages would change due to the fact that there were actually 402 rather than 410 carry on interviewees. (SRPX-4, questionnaire numbers 26043 to 26050).

562. With respect to responses to questions 5 and 6 for carry ons, Rappeport concluded that respondents were about one-half as likely to identify other bags as Hartmann's as they were to identify the Hartmann bag itself as a Hartmann; that adding together those who identified a bag as a Hartmann and those who said either they "cannot tell whether the luggage is a Hartmann product or whether instead its a copy of the Hartmann product" (b) or they

"believe the luggage is a copy of Hartmann but don't know by who" (c), between 30-35% of the respondents in each case demonstrated or said they were confused among the bags; and that in his opinion, this reflects a substantial degree of confusion as to source if origin of the challenged bags. (CX-148 at 9).

563. Rappeport's results of from 389 interviewees asked question number 5 in the Rappeport questionnaire for attache cases were as follows:

	Hartmann Attache Case		K-Mart Attache Case (fabric)		K-Mart Attache Case (leather)	
	number	%	number	%	number	%
Identified as Hartmann----	110	28.3	85	21.9	53	13.6
Identified as other-------	38	9.8	30	7.7	36	9.3
Not identified-----------	241	61.9	274	70.4	300	77.1
Total-----------------	389	100.0	389	100.0	389	100.0

(SX-46, at 5-6, codes 1-11 to 1-13; SRPX-3, Rappeport Dep. Ex. 3).

564. The above table would have to be corrected due to a coding error where eight attache questionnaires were miscoded as carry on questionnaires. A correction would result in following correct tabulation:

	Hartmann Attache Case		K-Mart Attache Case (fabric)		K-Mart Attache Case (leather)	
	number	%	number	%	number	%
Identified as Hartmann----	111	28.0	85	21.4	54	13.6
Identified as other-------	41	10.3	31	7.8	38	9.6
Not identified-----------	245	61.7	281	70.8	305	76.8
Total-----------------	397	100.0	397	100.0	397	100.0

(SX-46, at 5-6, codes 1-11 to 1-13; SRPX-4, questionnaire numbers 26043 to 26050).

565. For the attache case questionnaires, the codes for the individual pieces of luggage shown to the interviewees during question 5 were as follows:

Manufacturer Name	Code
Hartmann	Piece A
K-Mart (Starco)	Piece B
K-Mart (Starco)	Piece C

(SRPX-3, Rappeport Dep. Ex. 3; CPX-31; CPX-32; CPX-34; CPX-42; CPX-44).

566. For attache cases, 56 percent of the interviewees had not identified any of the three bags shown to them. These interviewees were asked and responded to the following questions for each of the bags shown to them (percentage using the total 389 interviewees as base):

	Hartmann (Imitation Leather)		Hartmann (Fabric)		K-Mart (Leather)		K-Mart (Fabric)	
	number	%	number	%	number	%	number	%
a) No Opinion as to the Manufacturer of the luggage	48	12.3	41	10.5	83	21.3	86	22.1
b) Cannot tell whether the luggage is a Hartmann product or a copy of a Hartmann	19	4.9	24	6.2	36	9.3	36	9.3
c) Believe the luggage is a copy of Hartmann but don't know by whom	9	2.3	8	2.1	30	7.7	23	5.9
d) Have some other reason	10	2.6	9	2.3	20	5.1	24	6.2

(SX-46, at 4; SRPX-3, Rappeport Dep. Ex. 3; CX-148, at 9).

567. The above tabulation would have to be corrected for the fact that in two questionnaires (26044 and 26045) where the interviewees did not identify any of the three bags shown them, these questionnaires were included in the carry on results rather than the attache results. In addition, the percentages would change due to the fact that there were actually 397 rather than 389 attache interviewees. (SRPX-4, questionnaire numbers 26043 to 26050).

568. With respect responses to questions 5 and 6 for attache cases, Rappeport concluded that respondents were about one half to two-thirds as likely to identify other bags as Hartmann's as they were to identify the Hartmann bag itself as a Hartmann; that adding together those who identified a bag as a Hartmann and those who said either they "cannot tell whether the

luggage is a Hartmann product or whether instead its a copy of the Hartmann product" (b) or they "believe the luggage is a copy of Hartmann but don't know by who" (c), between 30-40% of the respondents in each case demonstrated or said they were confused among the bags; and that in his opinion, this reflects a substantial degree of confusion as to source of origin of the challenged bags. (CX-148 at 10).

569. The responses to question number 5 for all types of luggage, viz. "Can you tell me the manufacturer or brand name of this [attache, carry on, or hanger bag]?", were coded as follows for each of the three pieces shown (Piece A, Piece B, Piece C):

Manufacturer Name	Code
Hartmann	1
Samsonite	2
American Tourister	3
K-Mart	4
Oleg Cassini	5
General Store Name: i.e. Zayres, Sears, Penneys	6
Sasoon	7
Pierre Cardin	8
Other	0

(SRPX-3, Rappeport Dep. Ex. 3).

570. Kegan testified that although Rappeport asserts that the "three bags labeled "A", "B", and "C" were presented in a rotation pattern, beginning with the letter with an asterisk (*) on the questionnaire, many questionnaires had no asterisk." (Kegan, RX-12, at 14).

571. In asking question 5 concerning confusion, an interviewer showed the pieces of luggage in the order "A", "B", "C", if there was no asterisk next to any of the letters in the questionnaire. When an asterisk was present next to either "B" or "C", that bag was shown first, so that the bags were intended to be shown in a rotating order, i.e. one-third of the

interviewees saw bag "A" first, one-third saw bag "B" first, and one-third saw bag "C" first. (SRPX-3, Rappeport Dep. at 84-85).

572. The instructions that accompanied the questionnaire indicated that the interviewer should begin question 5 by first showing the piece marked with the "*". (CX-148, at "Interviewer Instructions").

573. A tabulation of the hanger bag questionnaires with respect to the placing of the asterisks for question number 5 showed:

No asterisk-------------------	104	questionnaires
Asterisk next to piece "A"----	65	questionnaires
Asterisk next to piece "B"----	115	questionnaires
Asterisk next to piece "C"----	114	questionnaires
Total	398	

Based on the instructions accompanying the questionnaire for question 5, the distribution should be that 133 questionnaires have an asterisk next to "A", 133 questionnaires have an asterisk next to "B", and 133 questionnaires have an asterisk next to "C". Based on Dr. Rappeport's testimony that questionnaries with no asterisk represented interviewees who were shown piece "A" first in question number 5, about 42 percent of interviewees were actually shown hanger bag "A" first (Kluge or American Guard It), about 29 percent were actually shown piece "B" first (Montgomery Ward), and 29 percent were actually shown piece "C" first (Hartmann). (SRPX-4, hanger bag questionnaires; CX-148, "Interviewer Instructions).

574. A tabulation of the attache case questionnaires with respect to the placing of the asterisks for question number 5 shows:

No asterisk-------------------	100	questionnaires
Asterisk next to piece "A"----	35	questionnaires
Asterisk next to piece "B"----	126	questionnaires
Asterisk next to piece "C"----	129	questionnaires
Total	390	

Based on the instructions accompanying the questionnaire for question 5, the distribution should be that 130 questionnaires have an asterisk next to "A", 130 questionnaires have an asterisk next to "B", and 130 questionnaires have an asterisk next to "C". Based on Rappeport's testimony that questionnaries with no asterisk represented interviewees who were shown piece "A" first in question number 5, about 35 percent of interviewees were shown hanger bag "A" first (Hartmann), about 32 percent were shown piece "B" first (K mart leather), and about 33 percent were shown piece "C" first (K mart fabric). (SRPX-4, attache case questionnaires; SRPX-3, Rappeport Dep. Ex. 3).

575. A tabulation of the carry on luggage questionnaires with respect to the placing of the asterisks for question number 5 shows:

No asterisk-------------------	86	questionnaires
Asterisk next to piece "A"----	77	questionnaires
Asterisk next to piece "B"----	120	questionnaires
Asterisk next to piece "C"----	119	questionnaires
Total	402	

Based on the instructions accompanying the questionnaire for question 5, the distribution should be that 134 questionnaires have an asterisk next to "A", 134 questionnaires have an asterisk next to "B", and 134 questionnaires have an asterisk next to "C". Based on Rappeport's testimony that questionnaries with no asterisk represented interviewees who were shown piece "A" first in question number 5, about 40 percent of interviewees were shown hanger bag "A" first (Montgomery Ward and American Guard It), about 30 percent were shown piece "B" first (Kluge), and about 30 percent were shown piece "C" first (Hartmann). (SRPX-4, carry-on questionnaires; SRPX-3, Rappeport Dep. Ex. 3).

576. The number of questionnaires for the previous finding (402) differs from Rappeport's total number of questionnaires for carry-ons (410),

because eight questionnaires (26043 to 26050) were coded and counted as responses for carry on bags, even though the questionnaires themselves contain language indicating the questionnaires pertained to attache cases. (SPRX-4, carry-on questionnaires; SRPX-3, Rappeport Dep. Ex. 3; SX-46, at 3).

577. According to Rappeport, the approximate sampling error varies in proportion to both the number of people spoken to and the number of people who gave an answer. For a sample of 400 interviewees, with 10 percent responding "yes" to question 2, the sample error is plus or minus 3 percent. The sampling errors based on the number of "yes" responses and the size of the sample are as follows (in percent):

	Percentage responding "yes" to Question 2			
	5%	10%	30%	50%
Sample size:				
400-----	2.0%	3.0%	4.0%	5.0%
1,200-----	1.5%	2.0%	2 to 3%	3.0%

(SRPX 3, Rappeport Dep. at 11-14, Rappeport Dep. Ex. 7).

578. According to Rappeport, a formula to estimate the sampling error is the following. Two times the square root of: the percentage responding "yes" times 1 minus the percentage saying "yes", divided by the sample population. (SRPX 3, Rappeport Dep. at 11-14, Rappeport Dep. Ex. 7).

579. Kegan testified that the confusion evidenced by the Rappeport study relates to confusion in the marketplace, not confusion caused by respondent Kingport by false designation of origin. (Kegan RX-100, at 7).

580. The Rappeport survey does not address the question of whether there is confusion as to source of origin in the minds of consumers at the point of purchase of the luggage products in issue. (Rappeport Tr. at 912-14).

VII. Importation and Sale

Respondent Starco

581.

582.

583.

584.

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585.

586.

587.

(SX-5, Ans. to Int. No. 15 attachment at 1).

588.

589.

590.

591. Starco sold attache cases to K mart under the trade name "STARCO". (SX-6, Ans. to Int No. 8 at 5, 6).

593*.

594.

---

* There is no finding of fact 592.

595.

596. Starco advertises their products in magazines including;

The Economic News: 100,000 copies per year,
Trade Winds: 150,000 copies per year,
Travelware: published by U.S.A.

Starco mails 120,000 copies of literature (includes catalogs, soft side cases instruction) to its customers each year. Starco attended a leather goods show at the New York Colosseum. (SX-6 Ans. to Int. No. 20 at 13.)

Respondent K mart

597. K mart purchases one style of infringing attache cases (Style 705 "STARCO") from Starco and sells the same in the United States through its various retail outlets. K mart sold attache cases in its retail outlets under the trade name "STARCO". (SX-7, Ans. to Int No. 8 at 4; Ans. to Int. No. 13 at 6).

598.

599. K mart purchases leather as well as fabric attaches from Starco. (SX-7 Ans. to Int. Nos. 9 and 10(e) at attachment 1).

600. K mart purchases Starco Style 705 in two different models, an all leather and a jute tweed attache. The leather attaches come in black or tan and the jute tweed in beige, brown or gray. All of the attaches are the same size. (RPX-10 (part 1) Gallup Dep. at 12, 13).

601. K mart assigns product numbers to the Starco bags it sells as follows:

Attache Case	Starco Stock Number	K mart Product Number
Jute Beige	7051	36-85932
Jute Brown	7052	36-85941
Jute Gray	7053	36-85959
Leather Tan	7054	36-85967
Leather Black	7055	36-85975

(RPX-10(part 1) Gallup Dep. at 18).

602. K mart's retail prices for its Style No. 705 attache cases in 1985 were:

K mart Style	Retail Price
7051:	U.S. $ 89.97 per piece
7052:	U.S. $ 89.97 per piece
7053:	U.S. $ 89.97 per piece
7054:	U.S. $129.88 per piece
7055:	U.S. $129.88 per piece

(SX-6, Ans. to Int. No. 9 at 6; RPX-10(part 1) Gallup Dep. at 104).

603.

604. K mart had an inventory of 6,879 attache cases as of August 4, 1986. (SX-7, Ans. to Int. No. 10(f) at attachment 2).

605.

K mart put a stop on the order as a result of the litigation initiated by Hartmann at the ITC. Starco notified K mart of the litigation an the order

334

was held until it was cancelled on 7-1-86. The order was contingent on the attaches being shipped by 5-1-86 and when Starco neither manufactured or shipped the bags the order was cancelled automatically. (CX-89 at 2; RPX-10(part 1) Gallup Dep. at 107-109).

606. K mart advertised the attaches it purchased from Starco in an insert in People's Magazine December 15-17, 1985; December 8-10, 1985 and December 9-18, 1985. (SX-7, Ans. to Int. No. 20 at 8).

Respondent Kingport

607.

(SX-8, Ans. to Int. No. 6(b&c) at 5.)

608.

(SX-8, Ans. to Int. Nos. 7 & 3 at 6, 3).

609.

(SX-9, Ans. to Int. No. 10, attached invoices; CX-128, Ans. to Int. No. 6).

610. Kingport supplied

(SX-9, Ans. to Int. No. 13 at 2).

611. Kingport supplied the following information with respect to

dealer cost and suggested retail price for its Kluge luggage products:

Item No	Description	Suggested Retail	Price to Dealer
K4VT	4 Suiter Nylon	$ 69.95	
K4L	4 Suiter Leather	300.00	
K8VT	Carry-on Nylon	39.95	

(CX-128, Attachment).

Respondent Dimensions

612.

(SX-10, Ans. to Ints. 6-9, at 5-9).

613.

(SX-10 Ans. to Int. No. 10).

614. Dimension's has not been involved in the manufacturing, exporting or importing of the accused products. Dimension is in the business of "direct response marketing". (SX-10, Ans. to Ints. 6-9, at 5-9).

615.

(SX-10, Ans. to Int. No. 14(c) at 10).

616.

(SX-10,
Ans. to Int. No 9 at 6, 7).

617.

Fiscal Year-End Inventory

Year	St. Ives Valet		St. Ives Companion	
	Units	$	Units	$

(SX-10 Ans. to Int. Nos 10 e & f at 7, 8).

618. Dimension's offers the accused products for sale in direct response to "offerings", i.e., catalogs, inserts and occasionally advertisements in magazines and newspapers. Dimensions has no sales force, offerings are made to a national market through direct response offerings. Mailings are to ultimate users whose names are taken from lists generated by Dimensions and from other lists that Dimensions might rent. (SX-10, Ans. to Int. No. 18 at 13).

Respondent Monarch

619. Monarch has been in the business of manufacturing, importing and selling various luggage products for approximately 39 years. (SX-13, Ans. to Int. No. 3 at 3).

620.

(CX-133, Ans. to Int. No. 6).

Respondent Montgomery Ward

621. Montgomery Ward was engaged in the importation of infringing hanger bags during 1985 and 1986 and was engaged in the sale, distribution and marketing of accused hanger bags and carry-on bags in the United States during the years 1984, 1985 and 1986. No records exist for 1983. (SX-12, Ans. to Int. No. 2 at 2).

622. In 1984 Montgomery Ward commenced purchasing Article Number 906700 and 906710 from Hiraoka Ltd, 2770 Berteau, Chicago, Illinois 60613 (Hiraoka Chicago). In 1985 and 1986, Montgomery Ward purchased Article Nos. 906700, 906701, 906710, and 906711 from Hiraoka Chicago. In 1985 and 1986 Montgomery Ward also purchased Article Nos. 906700 and 906701 from Hiraoka &

Co., (Taiwan) Ltd., 7th Floor, Min Sheng E Road, Taipei, Taiwan (Hiraoka Taiwan). (CX-132, Ans. to Int. No. 6b iv at 5).

623.

(CX-132, Ans. to Int. No. 6; SX-12, Ans. to Int. Nos. 1 and 6).

624. Montgomery Ward purchases luggage products from various suppliers as well as directly importing certain luggage items from overseas. These products are then distributed to Montgomery Ward's approximately 319 retail stores and are sold to the general public. (CX-132, Ans. to Int. No. 22 at 9).

625. Montgomery Wards purchases, cost unit sales and retail price of accused products are as follows:

(CX-132, Ans. to Int. No. 6b iv, v at 5-6; SX-12, Ans. to Int. Nos. 1 and 6).

Respondent American Guard-It

626.

(CX-129 at 7-8, 18, 24-26).

627. Max Jaffe, president of American Guard-It for the last 25 years testified that American Guard-It is in the business of manufacturing and importing luggage, but primarily manufacturing luggage. (CX-129, Jaffe Dep at 5.)

(CX-129, Jaffe Dep. at 10, 12; CX-157).

628.

The hanger bag is advertised at $130.00 reg. price, on sale for $65.00 and the carry-on bag is advertised at $90.00 reg. price, on sale for $45.00. (CX-131 at p. 37).

Respondent Pedro

629. Pedro Companies, Inc.

A

breakout of sales by year was not provided. (CX-136, Affidavit of Carl Pedro).

Respondent Pungkook

630. Pungkook is engaged in the manufacture and sale of luggage.

(Settlement Agreement, 3(a) & (b)). Pungkook was the only respondent accused of importing soft pullmans. (Pre. Hearing Tr. at 40-46).

Respondent Pei Lin

631.

(A club tote, not in issue in this investigation, was also part of the set). (CX-49, catalog at page 5).

Respondent Weltyle

632. Weltyle warranted that it did not export, import or sell any of the accused products. (Consent Order Agreement, September 22, 1986). No evidence was supplied with respect to Weltyle.

Respondent Winn

633. Winn International warranted that it did not purchase or sell the accused products. (Settlement Agreement, September 29, 1986). No evidence was supplied with respect to Winn.

634. In a letter to Allied, Hartmann refers to Allied's "import program for luggage." However, in Allied's Letter Agreement agreeing to redesign its luggage, it never refers to the source of its luggage, whether it was domestic or imported. (CX-37).

635. Total known imports or import sales, relevant to the injury analysis, by year and by type of luggage product, are as follows: */

	Attaches	Carry Ons	Hanger Bags
1983-------------	-	5,739	10,883
1984-------------	-	14,797	17,179
1985-------------		10,989	10,154
1986-------------	-	468	263
Year not known **/	-	1,000	1,750
Total----------		32,993	40,229

*/ Imports by Montgomery Ward not included because both Montgomery Ward and its foreign supplier settled.

**/Year of importation not known, but imported primarily between 1984 and 1986.

VIII. Domestic Industry

636. The Hartmann Luggage Company was started in 1877 by Joseph Hartmann. Hartmann was purchased by the Katz family in 1955, at which time its product line included a small number of trunks (1% of the product line) and hand luggage. Ira Katz was executive vice president in 1955, president in 1957 and became chairman and chief executive officer in 1959. (SRPX-2 pt. 1 Katz Dep. at 1-3).

637. Hartmann was purchased by Lenox, Inc. in 1983. (Penix, Tr. at 278).

638. Katz retired from Hartmann in January of 1985, and pursuant to an agreement with Lenox Inc., stayed on for a two year period to train his successor. (SRPX-2 pt. 1 Katz Dep. at 8-9).

639. Hartmann has its headquarters at Hartmann Drive, Lebanon, Tennessee. Hartmann manufactures the luggage at issue at its facilities in Lebanon and Smithville, Tennessee. All of Hartmann's design, assembly and sales activities with respect to the luggage products at issue are carried out in these two facilities. (CX-24 at 2; CX-142 at 2; SX-2, Ans. to Int. No. 16).

639a. Hartmann's engineering, manufacturing, training and sales operations are all set in Lebanon and Smithville, Tennessee and all of Hartmann attache cases, hanger bags, carry-on bags and soft pullmans involved in this investigation are produced at these locations. (CX-142, Ross direct, ¶ 5).

639b. Hartmann has facilities of approximately square feet. Of these facilities, square feet are leased. Some square feet are used for manufacturing, square feet are used for storage of finished goods, square feet are used for storage of raw materials, square feet are used for general storage, and square feet are used for offices. (CX-142, Ross at 2).

640. Hartmann presently employs approximately persons. Of these persons, approximately are involved in manufacturing, about are involved in sales and marketing, about are involved in administration and support. Of the approximately persons involved in manufacturing, about of them are involved in customer service and repair. (CX-142, Ross direct, ¶ 7).

641. Belting leather is the only raw material for the products involved in this investigation that Hartmann purchased outside the United States, and represents about of all raw materials purchased by Hartmann. The belting leather is imported from Canada. (Penix, Tr. at 141-2).

642. Based on the difference between Hartmann's unit cost of sales for A4 and A9 attache cases made with belting leather, and the same models made with vinyl, and the similarity of the production process in other respects, belting leather represented about of the cost of an A4 attache, and of the cost of an A9 attache, in 1985. For other luggage the subject of this investigation, the belting leather represented: of the cost of a C2 carry on; of the cost of a C3 carry on; of the cost of an H1 (48 inch) hanger bag; of the cost of an H3 (48 inch) hanger bag; of the cost of a 24-inch soft pullman; and of the cost of a 26-inch soft pullman. (CX-68 at 4-5; CX-10).

643. Ms. Penix testified that an "h" embossed in the center of a small leather patch probably an inch and a quarter in diameter with stitching on the outer edge appears on all of Hartmann's luggage products and is identifiable as the Hartmann logo. The "h" on the patch has been trademarked; and that the name Hartmann is a registered trademark. (SPX-3, Penix Dep. at 100-101, 193-195).

644. Ms. Penix testified that Hartmann exports less that percent of its sales . (SPX-3, Penix Dep. at 119).

645. Mr. Davis, a designer of luggage products for Hartmann worked for Hartmann from 1968 through July 1985. (SPX-4, Davis Dep. at 4).

646. Davis "believed in 1972 that the overall appearance of the Hartmann attache cases and International series had become so associated with Hartmann that in designing soft luggage pieces such as the hanger bag and carry-on bag to be added to the Hartmann line he attempted to use many of the same features for the appearance of the soft luggage." (CX-79, R. Davis pars. 1, 5).

647. Mr. Davis testified that he believed that "the total appearance of the Hartmann attache had become so associated with Hartmann that not only did the attache remain unchanged over the entire period of my employment, but elements of this total appearance were used in other items of Hartmann luggage which I designed in order to make them instantly recognized as Hartmann." (CX-79, Davis at par. 8).

648. Mr. Davis also testified that the attache, soft pullman, carry-on and hanger bags "all incorporate looks that play off each other." (Davis, Tr. at 613).

649. Davis kept the dominant features of the attache case when he developed the soft pullman even though it was very expensive to have a soft piece of luggage with square corners. (Davis Tr. at 684-85).

650. In Davis' opinion part of the reason for Hartmann's success with its soft luggage is that the soft pieces have maintained the same overall Hartmann design and image." (CX-79, Davis at par. 21).

651. Mr. Katz testified that the reputation of the Hartmann name "speaks for itself. Were very proud of our name. We are considered by our customers, both consumers and retail, to be the prestige name in luggage. We get letters all the time stating that. We are probably the most expensive of the domestic luggage companies. We believe that cost is returned to the consumer in value, both in the quality of the product and the maintenance if an understated, classic prestige look that has become unique." (SRPX-2 pt. 1 Katz Dep. at 29).

652. Ms. Penix testified that since 1983 Hartmann's products have been broken down into four categories; the International Series, the Executive

or attache series, the casual cases and the personal accessories. Prior to 1983 the A4 and A9 attaches were part of the International Series. (Penix Tr. at 275-76).

IX. Efficient and Economic Operation

653. Hartmann's capital expenditures for the last five fiscal years was as follows:

Fiscal Year	Amount

(SX-3, Capital Expenditures).

654. Hartmann's expenditures for advertising, which are primarily through the print media, were as follows for the years 1982-84:

(SX-2, Ans. to Int. No. 29).

655. Ms. Penix testified that Hartmann does not allocate advertizing funds for particular products. (SPX-3, Penix Dep. at 31, 32).

656. A March 1984 Consumer Reports rated the Hartmann A4 attache case as the highest in terms of overall quality, with the Hartmann EC7 rated eighth, out of 37 attache cases. (CX-23).

657. For the luggage industry as a whole, the U.S. Government reports that the value added by manufacture per production worker employee was approximately $41,000 in 1984. For Hartmann, this figure was at $60,000. (CX-78, Nehmer at 10; CX-52; CX-53).

658. Between 1981 and mid-1983, based on an engineering study

concerning direct labor operations, Hartmann

(CX-142, Ross at 5).

659. In 1984 and 1985, Hartmann purchased

(CX-142, Ross at 5).

660. In 1982-83, Hartmann had research and development expenditures in connection with developing its soft Pullman luggage and EC7 and EC8 attache cases. (CX-142, Ross at 6).

661. Mr. Davis testified that sometime during 1985 salaries were placed in the research and development budget. (SPX-4, Davis at 262).

662. The quality control department at Hartmann consists of the director of quality control, a manager of quality control and quality control auditors.The auditor's jobs are to sample the product at all stages, including raw materials, manufacturing, finished product, a final audit and then a finished goods warehouse audit. (CX-84, Aston at 3-6).

663. During final inspection, every bag is checked both inside and out for construction defects or flaws. There are presently about final inspectors at Hartmann whose sole responsibility is inspecting the finished products. (CX-84, Aston at 5).

664. Every bag coming off the line is inspected for quality control purposes. (SPX-3 Penix at 251).

665. Traditionally of Hartmann's production are seconds. (SPX-3, Penix at 277).

666. Returns of Hartmann luggage due to manufacturing defects have been at or less. (CX-24, Penix at 10).

667. Hartmann has a published 18 month warranty, and Hartmann repairs its products not subject to undue abuse even after the 18 month

warranty period. (CX-24, Penix at 10).

668. In a 1983 retailer survey prepared by the Gallup Organization, Hartmann was second to Samsonite in being carried by more U.S. retailers than any other brand of luggage. (CX-57).

669. The basic operations of Hartmann are the same today as in 1968, with the exception of the addition of updated machinery. (Penix Tr. at 96).

670. Hartmann uses basically five fabrications. All of the fabrications are purchased locally except the belting leather which is purchased in Canada. Approximately of the leather used in the attache case is from Canada the other of the leather is purchased domestically. (SPX-3, Penix at 122-23).

671.

(SX-16, at 2; Penix Tr. at 151-52).

672.

(Penix Tr. at 142-43).

673.

(Penix Tr. at 94-95).

674. Hartmann's unit sales of the luggage involved in this investigation (attaches A4, A9, hanger bags, carry on bags, and soft Pullman suitcases) as a percentage of Hartmann's total luggage sales is as follows:

1981------------- percent
1982------------ percent
1983------------ percent
1984------------ percent
1985 */--------- percent

*/ Fiscal year ending 4/30/86. (SX-2, Ans. to Int. No. 8; CX-26 to CX-29; CX-77).

X. Substantial Injury

675. Hartmann's sales of luggage products during 1983 to the spring of 1986 were as follows (units):

Model	1983		1984		1985		1986
	Spring	Fall	Spring	Fall	Spring	Fall	Spring

(CX-66).

676. Hartmann's net sales of attaches, by fiscal years, is as follows for the styles (units):

Fiscal Year
2/1/82 to 1/31/83--
2/1/83 to 1/31/84--
2/1/84 to 1/31/85--
2/1/85 to 4/30/85--
5/1/85 to 4/30/86--
(CX-26; Penix Tr. at 345).

677. Hartmann's net sales of hanger bags, by fiscal years, is as follows for the H1 and H3 styles (units):

Fiscal Year	H1	H3	Total
2/1/82 to 1/31/83-----			
2/1/83 to 1/31/84-----			
2/1/84 to 1/31/85-----			
2/1/85 to 4/30/85-----			
5/1/85 to 4/30/86-----			

(CX-27; Penix Tr. at 345).

678. Hartmann's net sales of carry on bags, by fiscal years, is as follows for the C2 and C3 styles (units):

Fiscal Year	C2	C3	Total
2/1/82 to 1/31/83----			
2/1/83 to 1/31/84----			
2/1/84 to 1/31/85----			
2/1/85 to 4/30/85----			

(CX-28).

679. Hartmann's net sales of soft pullmans, by fiscal years, are as follows (units):

Fiscal Year	Total
2/1/83 to 1/31/84----	
2/1/84 to 1/31/85----	
2/1/85 to 4/30/85----	
5/1/85 to 4/30/86----	

(CX-29).

680. Hartmann's net sales of International series framed suitcases, by fiscal years, are as follows (units):

Fiscal Year	Total
1/30/82 to 2/1/83------	
1/30/83 to 2/1/84------	
1/30/84 to 2/1/85------	
2/1/85 to 4/30/85------	
5/1/85 to 4/30/86------	

(CX-25; Penix Tr. at 345-46).

681.

(Penix Tr. at 240-46; SX-34).

682.

684.

(CX-68).

685.

(SX-2, Ans. to Int. No. 6(d)).

686. Hartmann does not keep records of its annual production capacity for the products involved in this investigation, although it currently has about Complainant has been able to provide any needed increase in production and has expanded its production facilities when needed. (SX-2, Ans. to Int. No. 6(a); CX-142, Ross at 5).

687. Hartmann's dealer list prices since 1982 are as follows for those styles that are alleged to carry the Hartmann trademark:

	Date					
	7/82	3/83	1/84	9/84	9/85	3/86
Attache:						
A4:						
Leather-------	$135.70	$161.00	$189.60	$196.80	$201.60	$201.60
Vinyl---------	69.00	75.90	81.60	84.00	84.00	84.00
A9:						
Leather-------	181.70	200.10	223.20	230.40	235.20	235.20
Vinyl---------	80.50	85.10	91.20	93.60	93.60	93.60
Carry On:						
C2 (4200 vinyl)-	75.90	78.20	80.50	82.80	82.80	82.80
C3 (4200 vinyl)-	82.80	85.10	87.40	89.70	89.70	89.70
FC2-------------	115.00	115.00	117.30	121.90	126.50	126.50
FC3-------------	124.20	124.20	126.50	135.70	135.70	135.70
Hanger:						
H1 40" (4200 vin	-	64.40	69.00	73.60	78.20	78.20
H3 40" (4200 vin	103.50	91.08	92.00	96.60	101.20	101.20
FH1 40"(4200 Fab	-	78.20	-	85.10	-	-
FH3 40"(4200 fab	115.00	115.00	-	117.30	-	-
H1 48" (4200)---	-	66.70	71.30	75.90	80.50	80.50
H3 48" (4200)---	105.80	91.08	96.60	101.20	105.80	105.80
FH1 48"---------	-	80.50	-	87.40	-	-
FH3 48"---------	119.60	119.60	-	121.90	-	-
Soft Pullman: */						
SP 21" (4200)---	-	-	82.80	87.40	89.70	89.70
SP 24" (4200)---	-	-	89.70	94.30	101.20	101.20
FSP 21" (4400)--	-	-	105.80	117.30	126.50	126.50
FSP 24" (4400)--	-	-	112.70	124.20	135.70	135.70

*/ These are four of the light soft pullman luggage models.
(SX-3, Price lists; CX-66; CX-68).

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688.

(CX-68).

689. Dealer prices for Kluge (Kingport) imported hanger and carry on bags were as follows:

(SX-9, attachment).

690. Dimensions Unlimited purchased

(SX-10, Ans. to Int. Nos. 9, 10; See CX-121, Rosenfeld Dep. at 17-19).

691.

(SX-12, Ans. to Int. No. 9).

692.

(SX-39).

693.

694.

695. Hartmann has no set discount or rebate policies. (SX-2, Ans. to Int. No. 13).

696. Hartmann has never reduced its prices for its luggage products in response to competition from lower-priced accused imports. (SX-2, Ans. to Int. No. 31; Penix Tr. at 149-50).

697.

(Penix Hr. Tr. at 150).

698. Hartmann luggage is sold directly from Hartmann to the retailer. (CX-1, Katz Dep. at 40).

699. Hartmann sells its luggage through stores, with a total of about doors (actual outlets). (Penix Tr. at 234).

700. Hartmann has endeavored to obtain a segment of the up-scale market; i.e. anyone that could afford a Hartmann. Hartmann has traditionally

competed in this segment of the market, which has an opening price point of about There are some people that would not be likely prospects for Hartmann luggage. (CX-1, Katz at 105-06; Penix Tr. at 340).

701. Mr. Katz testified in response to the question "Is there any specific type of retailer that Hartmann sells to"? that "We sell almost entirely to department stores and up-scale luggage specialty stores, and with a very high standard that they must meet in order to become a Hartmann customer. We have only, or did when I left, have less than customers." (SPRX-2 pt. 1 Katz at 40).

702. Mr. Katz testified that that the Hartmann image is characterized with both consumers and retailers as "high quality, prestige major look as characterized by...the features of the luggage that make it look consistently up-scale, understated, classic, tailored." (SPRX-2 pt. 1 Katz at 40).

703. Mr. Katz testified that Hartmann tried "to sell only stores that from a quality and presentation point of view were stores we could be proud of and not ashamed of" and that Hartmann was "shooting to get a segment of what we call the up-scale market, which was really anyone that could afford Hartmann." (SRPX-2 pt. 1 Katz at 105).

704. Mr. Katz testified that in order to become a Hartmann dealer retailers must meet certain criteria including financial responsibility, good credit, be "up-scale" display products in a prestigious way, have a nice entrance to the store if it is specialty store and not have a lot of "boraxy-looking signs around". Mr. Katz stated that he did not believe K mart would fit into this criteria. (SRPX-2 pt. 1 Katz at 112-113).

705. Mr. Katz testified that Hartmann never sold only to wealthy people but tries to sell to anyone "who has the taste to appreciate Hartmann and can afford to buy it, whether they have to stretch to buy it or whatever ..." because Hartmann believes that once a customer buys another brand of luggage he is a customer lost because he bought something else. (SRPX-2 pt. 1 Katz at 167).

706. During Mr. Katz's tenure with Hartmann, Hartmann advertized in "mostly up-scale national magazines", including the New Yorker, Vogue, Town and Country, Travel and Leisure and spent initially about percent of sales on advertising, and was spending percent when he left in 1985. (SRPX-2 pt. 1 Katz at 32).

707. Ms. Penix testified that Hartmann is very selective in the stores it permits to carry Hartmann's products and that "Hartmann has established very definite criteria of the image of the store that it must be compatible with what we consider to be the image of our product" (SPX-3, Penix at 196).

708. Hartmann will not allow its brand in levels of distribution below its current distribution levels, and has standards for stores it allows its luggage to be sold in.

(SX-15 at 3; Penix Tr. at 235-36).

709.

(CX-78, Nehmer at 17; CX-55).

710. In some instances, imports of accused luggage will displace lower-priced imported luggage that are not Hartmann copies. (Nehmer Tr. at 435).

711. The overall market share growth of imported luggage indicates that at some price imported luggage does competes with higher priced U.S. luggage. (CX-78, Nehmer at 5-7).

712. Imported luggage tends to compete in the U.S. marketplace largely on the basis of price, with a marketing strategy that emphasizes a lower price relative to U.S.-produced items. (CX-78, Nehmer at 5).

713. A certain percentage of K mart customers that saw a copy of a Hartmann bag would confuse that luggage with Hartmann luggage, or at least an "up scale" type of luggage, according to Mr. Ira Katz. (CX-1, Katz at 144-45).

714. Some K mart shoppers would have the financial resources to be able to purchase a Hartmann bag. (CX-1, Katz at 144-45).

715. According to a tabulation of consumer response cards returned by purchasers of Hartmann handbags, totes, pullmans and attache cases in the spring of 1985,

(CX-78, Nehmer at 16; CX-48, at 2).

716.

(SX-16 at 7).

717.

(CX-48).

718.

(CX-24, Penix at 9).

719.

(SX-16 at 6).

720.

(SX-16 at 8-10).

721.

(SX-16 at 11).

722. Dorothy Penix, Senior Vice President of Hartmann, started to see copies of Hartmann luggage compete in the market sometime in the 1984 time frame. This referred to the St. Ives bag from Dimensions. (CX-24, Penix at 13; Penix Tr. at 206-07, 210-11).

723. In 1985, a Hartmann dealer, Wieners, was offering for sale both Hartmann and copies of Hartmann soft Pullmans, hanger bags, and one size of the carry on. (CX-24, Penix at 14; CX-38; CX-39).

724.

(CX-75).

725.

(CX-46).

726. John Wanamaker offered for sale attaches purchased from Seward Luggage Company during late 1985 that resembled Hartmann's A4 attache. The belting leather model was offered for a sale price of $199.99 and the vinyl models were offered for $119.99. Comparable retail prices for the Hartmann attaches would be between $400 and $420 for the A4 attache in belting leather, and $245 to $260 for the vinyl model. (CX-47; CX-68; CX-96).

727.

728. Certain retail establishments purchasing Hartmann luggage also purchased copies of Hartmann luggage through the Allied Stores buying group. However, the source of the look alike bags sold by Allied-affiliated retailers was not identified. (CX-78 at 23).

729.

730. Copies of Hartmann hanger and carry on cases were displayed in Allied affiliated stores such as Jordan Marsh in Florida, Sterns Dept. Store in New Jersey, Cain Sloan in Tennessee, and Mass Brothers in New Jersey. The source of these bags was not determined. (CX-24 at 13-14; CX-36; CX-37).

731. Ms. Penix of Hartmann believed the copies of Hartmann luggage sold by Allied stores was imported. (Penix Tr. at 211).

732. The matter between Allied Stores and Hartmann was resolved by an agreement with Allied dated September 1985, wherein Allied would redesign its products and would not in any way copy the Hartmann designs of the C1, C3, H1, and H3 bags. (CX-24 at 14; CX-38).

733.

(CX-49).

734.

(CX-101 at 171).

735.

(CX-115, Gerch Dep. at 54-56, 104-06; CX-117; CX-121, Rosenfeld at 24-30).

736.

737.

This order was cancelled because of the present action taken by Hartmann against Starco attache cases. (CX-89, at 2; RPX-10 (part 1), Gallup at 107-09).

738.

739. Respondent Monarch Luggage Co.

(CX-133).

740.

(CX-132, Ans. to Int. No. 6).

741.

(CX-136).

742.

(CX-121, Rosenfeld at 75-79).

743.

(CX-75, report to 2/3/86, at 1).

744. Ms. Penix of Hartmann was not aware of any imports that copied the International series of Hartmann luggage. Penix, Tr. at 344.

745. The slogan "We Don't Cut Corners" is a trademarked slogan for Hartmann. (Penix Tr. at 175).

746. Some of the accused products of respondents are of low quality. (CX-78; CX-79).

747.

(CX-129 at 18-20).

748. Mr. Davis compared a Starco copy of the Hartmann A4 attache case purchased from Ivey's in North Carolina (CPX 17) and from K mart (CPX 18) to a Hartmann A4 attache case. According to Mr. Davis, the quality of Starco attaches was well below that of the Hartmann attache. (CX-79 at 14-15).

749. Comparing the quality of the Hartmann cases with the accused cases, Mr. Davis concluded in each instance that the Hartmann cases were of

superior quality. (Davis Tr. at 566).

750. Any harm to Hartmann resulting from customers confusing lower-quality infringing luggage with Hartmann luggage is immeasurable. (Penix Tr. at 238-39).

751. Hartmann has received complaints and damaged luggage from consumers who have mistaken those pieces for Hartmann luggage. (CX-45; CX-99; CX-100; CX-138 to CX-140).

752. Domestic luggage manufactures must endeavor to remain competitive with imported luggage products by differentiating their product based on non-price features, particularly superior quality. (CX-78, Nehmer at 4; CX-50).

753. According to Mr. Nehmer, Hartmann has acquired some goodwill in the appearance of its luggage.

(Nehmer Hr. Tr. at 387; CX-78, Nehmer at 13).

754. High price stores may be motivated to buy inexpensive luggage because retailers can add a much larger markup on the imported merchandise than on the domestically produced merchandise. (Nehmer Tr. at 438, 442-46).

CONCLUSIONS OF LAW

1. The Commission has in rem jurisdiction and subject matter jurisdiction in this investigation.

2. The Commission has in personam jurisdiction over each of the respondents in this investigation.

3. There are no unfair acts in the importation of certain luggage products.

4. There is a domestic industry consisting in the manufacture of certain luggage products which domestic industry is efficiently and economically operated.

5. Assuming unfair acts have been proven, importation of certain luggage products has the effect to injure substantially the domestic industry.

6. Assuming unfair acts have been proven, importation of certain luggage products has the tendency to injure substantially the domestic industry.

7. There is no violation of section 337 in this investigation.

INITIAL DETERMINATION AND ORDER

Based on the foregoing findings of fact, conclusions of law, the opinion and the record as a whole, and having considered all of the pleadings and arguments presented orally and in briefs, as well as proposed findings of fact and conclusions of law, it is the administrative law judge's determination that there is no violation of section 337 in the importation and sale in the United States of certain luggage products.

The administrative law judge hereby CERTIFIES to the Commission the initial determination, together with the record of the hearing in this investigation consisting of the following:

1. The transcript of the hearing; and
2. The exhibits admitted into evidence as well as those offered, but not so admitted.

The pleadings of the parties are not certified, since they are already in the Commission's possession in accordance with Commission Rules of Practice and Procedure.

Further it is ORDERED that:

1. In accordance with Rule 210.44(b), all material heretofore marked in camera because of business, financial, and marketing data found by the administrative law judge to be cognizable as confidential business information under Rule 201,6(a), is to be given in camera treatment from the date this investigation is terminated.

2. Counsel for the parties shall have in the hands of the administrative law judge those portions of the initial determination which contain confidential business information to be deleted from the public version of the initial determination no later than Friday January 9, 1987. If no comments are received from a party it will mean that the party has no objection in removing the confidential status, in its entirety, from this initial determination.

3. This initial determination shall become the determination of the Commission forty-five (45) days after the service thereof, unless the Commission, within forty-five (45) days after the date of filing of the Initial Determination shall have order review of the Initial Determination or certain issues therein pursuant to 19 C.F.R. 210(b) or 210.55 or by order shall have changed the effective date of the initial determination.

Paul J Luckern

Paul J. Luckern
Administrative Law Judge

Issued: December 29, 1986

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.
BEFORE PAUL J. LUCKERN
ADMINISTRATIVE LAW JUDGE

In the Matter of :
: Investigation No.
CERTAIN LUGGAGE PRODUCTS : 337-TA-243

LIST OF COMPLAINANT'S EXHIBITS ADMITTED IN EVIDENCE

Complainant's Physical Exhibits

EXHIBIT	DESCRIPTION
CPX-1	Hartmann 24" International Series Pullman suitcase in walnut tweed; sponsoring witnesses Dorothy Penix and Robert Davis.
CPX-2	Hartmann A4(A3) attache case in belting leather; sponsoring witnesses; Dorothy Penix and Robert Davis.
CPX-3	Hartmann A9(A8) attache case in belting leather; sponsoring witnesses Dorothy Penix and Robert Davis.
CPX-4	Hartmann A4(A3) attache case in vinyl (Gallup Exhibit #5); sponsoring witnesses Dorothy Penix and Robert Davis
CPX-5	Hartmann A4(A3) attache case in walnut tweed (Gallup Exhibit #7); sponsoring witnesses Dorothy Penix and Robert Davis.
CPX-6	Hartmann H3 hanger bag in pack cloth with leather trim; sponsoring witnesses Dorothy Penix and Robert Davis.
CPX-7	Hartmann H1 hanger bag in pack cloth with leather trim; sponsoring witness Dorothy Penix and Robert Davis.
CPX-8	Hartmann C3 carry-on bag in pack cloth with leather trim; sponsoring witness Dorothy Penix and Robert Davis.

CPX-9	Hartmann C2 carry-on bag in pack cloth with leather trim; sponsoring witness Dorothy Penix and Robert Davis.
CPX-10	Hartmann Soft Pullman suitcase in pack cloth with leather trim; sponsoring witness Dorothy Penix and Robert Davis.
CPX-11	Hartmann EC7 attache case in belting leather; sponsoring witness Dorothy Penix and Robert Davis.
CPX-12	Starco (Seward) copy of Hartmann A4; sponsoring witness Dorothy Penix and Robert Davis.
CPX-13	Copy of Hartmann H3 hanger bag returned to Hartmann.
CPX-14	Tumi hanger bag.
CPX-15	Ventura Hanger bag.
CPX-16	French hanger bag.
CPX-17	Ivey's attache case from Starco in tweed; sponsoring witness Robert Tomlin.
CPX-18	K Mart attache case from Starco in tweed; sponsoring witnesses Mr. Gallup, Mr. Sales and Carole Splaine.
CPX-19	Hanger bag from St. Ives tested by Hartmann; sponsoring witness Robert Davis.
CPX-20	Hanger bag from Montgomery Ward; sponsoring witness Montgomery Ward.
CPX-20A	Parts removed from CPX-20.
CPX-21	Hanger bag from American Guard-It; sponsoring witness Max Jaffe.
CPX-21A	Parts removed from CPX-21.
CPX-22	Carry-on bag from Kluge; sponsoring witnesses Kingport and Dimensions.
CPX-22A	Parts removed from CPX-22.
CPX-23	Carry-on bag from American Guard-It; sponsoring witness Max Jaffe.
CPX-23A	Parts removed from CPX-23A.

CPX-24	Soft Pullman suit case from Weiners Luggage and Pungkook; sponsoring witnesses Weiner and Pungkook.
CPX-25	A film describing the manufacturing steps of the Hartmann International frame cases; sponsoring witness Robert D. Aston.
CPX-26	Starco Sleeve for attache (Gallup Exhibit #6).
CPX-27	K Mart attache case in leather; sponsoring witness Carole Splaine.
CPX-28	Kluge carry-on.
CPX-29	Montgomery Ward carry-on.
CPX-29A	Parts removed from CPX-29.
CPX-30	Hartmann carry-on in Peanut Butter.
CPX-31	K Mart attache case in fabric.
CPX-32	K Mart leather attache case.
CPX-33	Hartmann attache case in fabric.
CPX-34	Hartmann vinyl attache case.
CPX-35	Kluge hanger bag.
CPX-36	Montgomery Ward hanger bag.
CPX-37	Hartmann hanger bag in peanut butter.
CPX-38	Hartmann hanger bag in pack cloth.
CPX-39	Hartmann carry-on bag in pack cloth.
CPX-40	American Guard-It hanger bag.
CPX-41	American Guard-It carry-on bag.
CPX-42	Hartmann vinyl attache case.
CPX-43	Vinyl attache from Iveys.
CPX-43A	Parts removed from CPX-43.
CPX-44	K Mart attache in leather.

CPX-45(1)-C (2)(3)	Charts drawn by Dr. Michael Rappeport.
CPX-46(1)-C and (2)-C	Deposition of Daniel Kegan.
CPX-47	Deposition of Michael Davis.

Complainant's Documentary Exhibits

EXHIBIT	DESCRIPTION
CX-1	Designated portions of the deposition of Ira Katz of August 21, 1986.
CX-2	Hartmann ad, "The Difference Between Them is Only Skin Deep" (Dep. Ex. K-1); sponsoring witnesses Ira Katz and Dorothy Penix.
CX-3	Photograph of Hartmann A4, A9 and EC7 attache cases (Dep. Ex. K-2); sponsoring witness Ira Katz.
CX-4	Hartmann ad, "Hartmann Introduces the Over, the Under and the Hanger." (Dep. Ex. K-3); sponsoring witnesses Ira Katz and Dorothy Penix.
CX-5	Hartmann ad for the over (CM/CW), the under and the hanger (HM/HW), (Dep. Ex. K-4); sponsoring witnesses Ira Katz and Dorothy Penix.
CX-6	Hartmann ad, "The Hartmann Carry-On" (Dep. Ex. K-5); sponsoring witnesses Ira Katz and Dorothy Penix.
CX-7	Hartmann ad, "Sometimes the Best Christmas Presents Come After Christmas." (Dep. Ex. K-6); sponsoring witnesses Ira Katz and Dorothy Penix.
CX-8	Hartmann ad, "Hartmann Introduces the Shopping Bag" (Dep. Ex. K-7); sponsoring witnesses Ira Katz and Dorothy Penix.
CX-9	Hartmann ad, "Has Hartmann Really Gone Soft?" (Dep. Ex. K-8); sponsoring witnesses Ira Katz and Dorothy Penix.
CX-10	Hartmann ad, "The Best Way to Sell You on Hartmann's $50 Attache is to Show You Hartmann's $150.00." (Dep. Ex. K-9); sponsoring witnesses Ira Katz and Dorothy Penix.

CX-11	Hartmann ad, "Which is the Real Hartmann?" (Dep. Ex. K-10); sponsoring witnesses Ira Katz and Dorothy Penix.
CX-12	Hartmann ad, "The Naked Hartmann." (Dep. Ex. K-11); sponsoring witnesses Ira Katz and Dorothy Penix.
CX-13	Hartmann ad, "Luggage is an Investment and It Ought to Pay a Dividend." (Dep. Ex. K-12); sponsoring witnesses Ira Katz and Dorothy Penix.
CX-14	Hartmann ad in the New Yorker (Dep. Ex. K-13); sponsoring witnesses Ira Katz and Dorothy Penix.
CX-15	Hartmann ad, "We Don't Cut Corners." (Dep. Ex. K-14); sponsoring witnesses Ira Katz and Dorothy Penix.
CX-16	Hartmann ad, "Garment Center." (Dep. Ex. K-15); sponsoring witnesses Ira Katz and Dorothy Penix.
CX-17	Hartmann ad, "The Hard Case to Make. An Easy Case to Handle." (Dep. Ex. K-16); sponsoring witnesses Ira Katz and Dorothy Penix.
CX-18	Hartmann ad, "Case this Joint." (Dep. Ex. K-17); sponsoring witnesses Ira Katz and Dorothy Penix.
CX-19	Hartmann ad, "The Others Claim They Use Real Belting Leather" (Dep. Ex. K-18); sponsoring witnesses Ira Katz and Dorothy Penix.
CX-20	Hartmann ad, "Why Hartmann Doesn't Treat Casual Luggage Casually." (Dep. Ex. K-19); sponsoring witnesses Ira Katz and Dorothy Penix.
CX-21	Insert from Newsweek on Hartmann luggage (Dep. Ex. K-20); sponsoring witness Ira Katz.
CX-22	Insert in the New Yorker on Hartmann luggage (Dep. Ex. K-21); sponsoring witness Ira Katz.

CX-23	*Consumer Reports* of March, 1984 on attache cases, pp. 123 and 147-53; sponsoring witness Ira Katz.
CX-24-C	Witness Statement of Dorothy Penix.
CX-25-C	Chart of sales of International Series framed Pullman suitcases (excluding A4(A3) and A9(A8) for 1974-1986; sponsoring witness Dorothy Penix.
CX-26-C	Chart of sales of Hartmann attache cases A4(A3), A9(A8), EC7 and EC8 for 19745-1986; sponsoring witness Dorothy Penix.
CX-27-C	Chart of sales of Hartmann CW/CM, C3 and C2 for 1974-1986; sponsoring witness Dorothy Penix.
CX-28-C	Chart of sales of Hartmann HW/HM, H3 and H1 for 1974-1986; sponsoring witness Dorothy Penix.
CX-29-C	Chart of sales of Hartmann Soft Pullman Suitcases for 1983-1986; sponsoring witness Dorothy Penix.
CX-30	Hartmann Price Lists 1982-1986; sponsoring witness Dorothy Penix.
CX-31-C	Chart of print advertising expenditures from 1975-1986; sponsoring witness Dorothy Penix.
CX-32	Copies of Hartmann ads and flow charts; sponsoring witness Dorothy Penix.
CX-33	Copies of other representative Hartmann ads; sponsoring witness Dorothy Penix.
CX-34	Sample of Hartmann sales brochure; sponsoring witness Dorothy Penix.
CX-35	Hartmann current product brochure; sponsoring witness Dorothy Penix.
CX-36	Catalog sheets of Club Class copies from Allied Stores; sponsoring witness Dorothy Penix.
CX-37-C	Letter of June 7, 1985 from Irwin Much to Ralph Norfi of Allied Stores with attached copy of ad and letter agreement of October 4, 1985 between Hartmann and Allied Stores; sponsoring witness Dorothy Penix.

CX-38-C	Letter of September 26, 1985 by Lenox, Incorporated attorney to attorney for Weiners; sponsoring witness Dorothy Penix.
CX-39	Consent Judgment of December 16, 1985 in Hartmann Luggage v. Weiners Luggage, Civ. 85-6582; sponsoring witness Dorothy Penix.
CX-40	Ads showing Samsonite copies; sponsoring witness Dorothy Penix.
CX-41-C	Letter of October 2, 1985 from Hartmann to Samsonite; letter agreement dated March 18, 1986 between Hartmann and Samsonite; sponsoring witness Dorothy Penix.
CX-42	Settlement Agreement of October 30, 1985 between Hartmann and J.C. Penney and Halston Enterprises; sponsoring witness Dorothy Penix.
CX-43	Judgment and Permanent Injunction against Seward Luggage Company dated November 12, 1985; sponsoring witness Dorothy Penix.
CX-44	Letter of November 13, 1985 from W.F. Blackerby; sponsoring witness Dorothy Penix.
CX-45	Letter of November 21, 1985 from Hartmann to Mr. Blackerby and receipt; sponsoring witness Dorothy Penix.
CX-46	Charts of sales of Hartmann A4 and A9 attache cases to Wanamakers for 1984, 1985 and 1986; sponsoring witness Dorothy Penix.
CX-47	Product Sheet for Seward Diplomat attache case Wanamaker mailer; sponsoring witness Dorothy Penix.
CX-48-C	Hartmann consumer response card survey June, 1985; sponsoring witness Dorothy Penix.
CX-49	Declaration of David Bettinger with Exhibits AA, AB and AC.
CX-50 -	"Pack Up Your Troubles", Industrial Fabric Product Review, August 1986.
CX-51 -	"What's It Made Of? Fabrics in Softside Luggage", Robert Huntoon, Showcase, July/August 1986, pp. 43-47.

CX-52 - 1984 Annual Survey of Manufacturers, "Statistics for Industry Groups and Industries", M84 (AS)-1, U.S. Department of Commerce (Data for SIC 3161).

CX-53-C - Hartmann's Answer to 1984 Annual Survey of Manufacturers by U.S. Department of Commerce; sponsoring witness Richard Ross.

CX-54-C - Hartmann Financial Statements period ending April 30, 1986; sponsoring witness Richard Ross.

CX-55-C - Sales Volume by Category Based on Retail Year (February-January); sponsoring witness Dorothy Penix.

CX-56-C - Telecopy from Charles P. Kennedy to Bruce Malashevich, September 10, 1986

CX-57 - Final Report - Retailer's Attitudes Toward the Luggage Industry, Subcommittee of Luggage and Leather Goods Manufacturers of America Inc. to U.S. Department of Commerce, prepared by The Gallup Organization, Inc., June 1983.

CX-58-C - Telecopy from Bob McCornack to Bruce Malashevich, September 9, 1986, re New Hartmann Accounts opened in 1985; sponsoring witness Robert McCornack.

CX-59 - Memorandum of Julie Solomon to Files, September 9, 1986 (Re J.C. Penney).

CX-60 - Memorandum of Julie Solomon to Files, September 9, 1986 (Re K Mart).

CX-61 - Memorandum of Julie Solomon to Files, September 9, 1986 (Re Montgomery Ward).

CX-62-C - Telecopy from Bob McCornack to Bruce Malashevich, September 5, 1986, re Hartmann Average Shipment per Fashion and Trading Account Door in 1980 dollars; sponsoring witness Robert McCornack.

CX-63-C - New York State/New Jersey/Connecticut Market Retail Dollars for Fashion and Trade-up Stores, Retail years 1985, 1984, dated September 9, 1986; sponsoring witness Robert McCornack.

CX-64 - Telecopy from Bob McCornack to Bruce Malashevich of Los Angeles Map, September 9, 1986; sponsoring witness Robert McCornack.

CX-65-C - Los Angeles Market Area Fashion and Trade-up Stores, Retail Dollars, September 1986; sponsoring witness Robert McCornack.

CX-66-C - Hartmann Luggage Company Sales Analysis, 3/12/84; 5/2/84; 8/15/84; 2/21/85; 9/3/85; 2/18/86; and 8/5/86; sponsoring witness Dorothy Penix.

CX-67-C - Hartmann Luggage Company Strategic Plan, September 11, 1986.

CX-68-C - Hartmann Luggage Company Product Pricing, various dates; sponsoring witness Dorothy Penix.

CX-69 - Summary of Trade and Tariff Information, "Luggage", U.S. International Trade Commission, U.S.I.T.C. Publication 841, November 1977 at 1.

CX-70 - 1985-1986 Industry Norms and Key Business Ratios, Dun & Bradstreet Audit Services (Data for SIC 3161).

CX-71 - Standard Industrial Classification Manual, Sec. 3161.

CX-72 - Tariff Schedule of The United States Anno. (1986) cover and pp. 7-22.

CX-73-C - Lenox Incorporated Division Budget Cost Improvements, Budget year ending April 30, 1987; sponsoring witness Richard Ross.

CX-74-C - Selected pages from Hartmann Luggage Co. Financial Statements, various years; sponsoring witness Richard Ross.

CX-75-C - Hartmann Luggage Company Sales Analysis Reports, 1/31/84, 2/4/85, 2/3/86; sponsoring witness Robert McCornack.

CX-76 - U.S. Government Consumer Price and Producer Price Indices.

CX-77-C - Confidential Table of Units Orders/Estimated Dollars Value, H00045; sponsoring witness Dorothy Penix.

CX-78-C - Witness Statement of Stanley Nehmer and curriculum vitae.

CX-79 - Witness Statement of Robert Davis and curriculum vitae.

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CX-80 - Catalog sheets of attache cases by the Baltimore Luggage Company and Samsonite; sponsoring witness Robert Davis.

CX-81 - Lark Luggage brochure showing its carry-on bag; sponsoring witness Robert Davis.

CX-82 - Catalog sheet from The French Company showing its carry-on bags; sponsoring witness Robert Davis.

CX-83 - Test of November 28, 1984 by Precision Testing Laboratories on a Hartmann and St. Ives fabrics and notes on a St. Ives hanger bag; sponsoring witness Robert Davis.

CX-84 - Witness Statement of Robert D. Aston

CX-85-C - Regular sampling routine from quality control manual; sponsoring witness Robert D. Aston.

CX-86-C - Quality specification for the Hartmann H3 hanger bag; sponsoring witness Robert D. Aston.

CX-87-C - Portion of quality control manual describing the final audit; sponsoring witness Robert D. Aston.

CX-88A-C- Designated portions of deposition of John W. Gallup of K Mart on June 6, 1986.

CX-88-C - Project from Starco (Dep. Ex. 4); sponsoring witness John Gallup.

CX-89-C - K Mart documents responsive to Complainant's Interrogatory Nos. 18 and 31 (Dep. Ex. G2); sponsoring witness John Gallup.

CX-90 - Peoples Magazine insert for K Mart (Dep. Ex. G14A); sponsoring witness John Gallup.

CX-91-C - Designated portion of deposition of Wayne C. Sales of K Mart on June 30, 1986.

CX-92-C - K Mart Documents responsive to complainant's Interrogatory No. 1 (Dep. Ex. Sales #11) Recap Summary 1985 Orient Buying Trip.

CX-93-C - K Mart documents responsive to Complainant's Interrogatory No. 7 (Dep. Ex. Sales 12); sponsoring witness Wayne Sales.

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CX-94-C - K Mart Summary of 1986 Import Program by Category, pp. 1 and 33 (Dep. Ex. Sales 13); sponsoring witness Wayne Sales.

CX-95-C - Answers to Interrogatories from Star Leather Co.

CX-96 - Witness statement of Phil S. Patacky.

CX-97 - Witness statement of Robert Tomlin.

CX-98 - Witness statement of Carole A. Splaine.

CX-99 - Witness statement of Tammy Rodgers.

CX-100 - Note from American Airlines to Tammy Rodgers with photographs of pullman suitcase; sponsoring witness Tammy Rodgers.

CX-101 - Designated portions of the deposition of Roger Hockman, former Executive Vice President of Dimensions.

CX-102 - Pages 1 and 3 from Dimensions Catalog Fall/1982 (Hockman Dep. Ex. 4); sponsoring witness Roger Hockman.

CX-103 - Dimensions Catalog "The Sophisticated Traveler" (Hockman Dep. Ex. 5); sponsoring witness Roger Hockman.

CX-104 - Dimensions Catalog "The Sophisticated Traveler", pp. 1 and 31 (Hockman Dep. Ex. 6); sponsoring witness Roger Hockman.

CX-105 - Dimensions Catalog "Dimensions in Travel", pp. 1 and 5 (Hockman Dep. Ex. 7); sponsoring witness Roger Hockman.

CX-106 - Dimensions Catalog "Dimensions in Travel", pp. 1 and 5 (Hockman Dep. Ex. 8); sponsoring witness Roger Hockman.

CX-107 - Photograph of Hartmann H-3 hanger bag (Hockman Dep. Ex. 9); sponsoring witness Roger Hockman.

CX-108 - Dimensions Catalog Summer/1983 pp. 1 and 3 (Hockman Dep. Ex. 10); sponsoring witness Roger Hockman.

CX-109 - Dimension Catalog "Dimensions in Travel" pp. 1 and 5 (Hockman Dep. Ex. 11); sponsoring witness Roger Hockman.

CX-110 - Dimensions Catalog "Business Class", pp. 1 and 31 (Hockman Dep. Ex. 12); sponsoring witness Roger Hockman.

CX-111 - Dimensions Catalog "Dimensions in Travel", pp. 1 and 32 (Hockman Dep. Ex. 13); sponsoring witness Roger Hockman.

CX-112 - Dimensions Catalog "Dimensions in Travel" Fall/1985, pp. 1 and 31 (Hockman Dep. Ex. 14); sponsoring witness Roger Hockman.

CX-113 - Dimensions Catalog "Dimensions" Spring/1986 pp. 1, 3 and 22 (Hockman Dep. Ex. 15); sponsoring witness Roger Hockman.

CX-114 - Mailer for its St. Ives Valet (Hockman Dep. Ex. 16); sponsoring witness Roger Hockman.

CX-115-C Designated portions of the Depositions of Edward L. Gerch of Kingport on August 27, 1986.

CX-116-C A purchase order by Kingport dated November 2, 1981 (Gerch Dep. Ex. 2); sponsoring witness Edward Gerch.

CX-117-C A purchase order by Kingport dated March 10, 1983 (Gerch Dep. Ex. 3); sponsoring Edward Gerch.

CX-118-C Invoice No. S47176 from Kingport dated July 19, 1983; sponsoring witness Edward Gerch (Gerch Dep. Ex. 4).

CX-119 - Catalog page from Kingport showing St. Ives valet, the accused hanger bag (Gerch Dep. Ex. 6); sponsoring witness Edward Gerch.

CX-120 - Catalog page from Kingport for its K-8 carry-on (Gerch Dep. Ex. 8); sponsoring witness Edward Gerch.

CX-121-C Designated portions of the Deposition of Warner D. Rosenfeld of August 28, 1986.

CX-122 - Copy of Hartmann ad found in Kingport file (Rosenfeld Dep. Ex. 1); sponsoring witness Warner Rosenfeld).

CX-123 - Copy of Hartmann Nouveau Hobo ad found in Kingport file (Rosenfeld Dep. Ex. 2); sponsoring witness Warner Rosenfeld).

CX-124 - Copy of Hartmann dealer pricelist, effective March 1, 1981 found in Kingport file (Rosenfeld Dep. Ex. 3); sponsoring witness Warner Rosenfeld.

CX-125 - Copy of Hartmann dealer pricelist, effective March 1, 1976 found in Kingport file (Rosenfeld Dep. Ex. 4); sponsoring witness Warner Rosenfeld.

CX-126 - Copy of Hartmann dealer pricelist, effective March 1, 1981 found in Kingport file (Rosenfeld Dep. Ex. 5); sponsoring witness Warner Rosenfeld.

CX-127 - Copy of ad for the Hartmann Casuals found in Kingport file (Rosenfeld Dep. Ex. 6); sponsoring witness Warner Rosenfeld.

CX-128-C Kingport's Supplemental Answers and Interrogatories and attached production documents.

CX-129 - Designated portions of the deposition transcript of Max Jaffe of American Guard-It from August 28, 1986.

CX-130 - Sheet for "Guard-It Multi-Pak" Collection (Jaffe Dep. Ex. 2); sponsoring witness Max Jaffe.

CX-131 - Hahne's September sale catalog p. 37 (Jaffe Dep. Ex. 3); sponsoring witness Max Jaffe.

CX-132 - Respondent Montgomery Ward & Co., Inc's response to Complainant's Interrogatories Nos. 1-36, with attached photographs Exhibits H-K.

CX-133 - Respondent Monarch Luggage Company, Inc.'s Supplemental Response to Complainant's Interrogatory No. 6 to Respondents.

CX-134 - Catalog sheet of Monarch Luggage Company showing styles 946 and 921.

CX-135 - Catalog sheets showing Monarch hanger bag and carry-on bag.

CX-136 - Affidavit of Carl Pedro of Pedro Companies (Inc.) with attached photographs.

CX-137 - Witness Statement of Norma Pelletier.

CX-138 - Letter of January 30, 1986 from William N. Alper to Hartmann; sponsoring witness Norma Pelletier.

CX-139 - Ad from Fortunoff of December 9, 1984 showing a hanger bag H224; sponsoring witness Norma Pelletier.

CX-140 - Letter of February 12, 1986 from Norma Pelletier to W. Alper; sponsoring witness Norma Pelletier.

CX-141 - Witness Statement of Andrea Harkins.

CX-142-C Witness Statement of Richard Ross.

CX-143-C Chart of Hartmann Net Income for 1975-1986; sponsoring witness Richard Ross.

CX-144-C Chart of Hartmann's Capital Expenditures for 1975-1986; sponsoring witness Richard Ross.

CX-145-C Chart of Hartmann Research & Development Expenditures for 1975-1986; sponsoring witness Richard Ross.

CX-146-C Chart of Hartmann Direct & Indirect Labor Expenditures for 1975-1986, sponsoring witness Richard Ross.

CX-147 -C Witness Statement of Michael Rappeport and curriculum vitae.

CX-148-C Report on confusion among certain luggage products by RL Associates, September, 1986; sponsoring witness Michael Rappeport.

CX-149-C Answer to Interrogatories by Dimensions Unlimited.

CX-150 - Witness Statement of Robert McCornack.

CX-151 - License Agreement of November 1, 1973 between Halston Enterprises and Hartmann Luggage Company (pp. 1, 9, 10, 39 and Schedule B); rebuttal to SX-44.

CX-152 - Seward 1977 Catalog; rebuttal to SX-40 through 42.

CX-153 - Photograph of Dayco Pullman suitcase; rebuttal to SX-43.

CX-154 - Letter of June 30, 1969 from R. Wolk to C.B. Morsell; rebuttal to SX-43.

CX-155 - Additional designated portions of deposition of Warner Rosenfeld; rebuttal to Rosenfeld witness statement (RKX-28).

CX-156-C- Rebuttal Witness Statement of Michael Rappeport on survey; rebuttal to Kegan Witness Statement. (RKX-100).

CX-157 - Copy of survey questions used in Textron, Inc. v. U.S. Intern. Trade Com'n, 753 F.2d 1019 (Fed. Cir. 1985).

CX-158 - Stipulation.

CX-159 - Survey questionnaire answers containing identification of Hartmann by name for attache cases.

CX-160-C- Typed version of CPX-45.

Respectfully submitted,

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By: ______________________
LAWRENCE I. LERNER

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.

In the Matter of)
) Investigation No.
CERTAIN LUGGAGE PRODUCTS) 337-TA-243

Star Leather Products Co. Ltd.'s Second Revised Exhibit List

RX1	Witness statement of Michael Davis
RX2	Not used
RX3	Not used
RX4	Expired Utility Patent 3,161,271
RX5	Expired Design Patent Des. 198,661
RX6	Expired Design Patent Des. 198,662
RX7-C	Hartmann Luggage Executive Summary
RX8	Hartmann Brochure
RX9-RX11	Not used
RX12-C	Witness Statement of Daniel L. Kegan, with attachments (former RKX 100 with attachments RKX 101-118).

Physical Exhibits

RPX1	Starco attache with hang tags
RPX2	Starco sleeve
RPX3-RPX9	Not used

RPX10-C (Parts 1 and 2)	Deposition of John W. Gallup
RPX11-C	Deposition of Wayne C. Sales

Respectfully Submitted

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436
Before Paul J. Luckern
Administrative Law Judge

In the Matter of)
)
CERTAIN LUGGAGE PRODUCTS) Inv. No. 337-TA-243
)

REVISED EXHIBIT LIST OF THE COMMISSION INVESTIGATIVE STAFF

SX-1	Exhibit List of Commission Investigative Staff
SX-2 (C)*	Complainant's Responses to First Set of Interrogatories of the Commission Investigative Staff
SX-3 (C)	Complainant's Documents (H 00001 - H 000045) Produced in Response to First Document Production Request of the Commission Investigative Staff
SX-4 (C)	Complainant's Responses to Second Set of Interrogatories of the Commission Investigative Staff
SX-5 (C)	Respondent Star Leather Product Co. Ltd.'s Response to First Set of Interrogatories of the Commission Investigative Staff
SX-6 (C)	Respondent Star Leather Product Co. Ltd.'s Supplemental Response to First Set of Interrogatories of the Commission Investigative Staff
SX-7 (C)	Respondent K Mart Corporation's Response to the Commission Investigative Staff's First Set of Interrogatories
SX-8 (C)	Respondent Kingport International Corporation's Answers and Objections to the Commission Investigative Staff's First Set of Interrogatories (Nonconfidential and Confidential)
SX-9 (C)	Respondent Kingport's Supplementation of its Confidential Answers to the Commission's First Set of Interrogatories and Request for Production of Documents and Things

* The (C) beside the exhibit number denotes that the document contains confidential business information.

Note: All staff exhibits were admitted into evidence during the hearing.

SX-1

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SX-10	(C)	Answers and Objections of Respondent Dimensions Unlimited to the First Set of Interrogatories of the Commission Investigative Staff Propounded to Respondent
SX-11	(C)	Response of Weltyle Plastics Products Co., Ltd. to Complainant's Interrogatories Nos. 1-36 and First Request for Production of Documents
SX-12	(C)	Respondent Montgomery Ward & Co., Incorporated's Response to First Set of Interrogatories of Commission Investigative Staff
SX-13		Respondent Monarch Luggage Company, Inc.'s Responses to Complainant's Interrogatories Nos. 1-36 to Respondents
SX-14		Judgment and Permanent Injunction between Hartmann Luggage Company and Seward Luggage Company in the U.S. District Court for the Southern District of New York
SX-15		Consent Judgment between Hartmann Luggage Company and Wieners Luggage, Inc., Fred Cohen, and Milton Cohen in the U.S. District Court for the Central District of California
SX-16	(C)	Hartmann Luggage Company's Executive Summary for its Strategic Plan - FY 1986, dated September 11, 1985
SX-17		Letter dated 6/3/69 from C.B. Morsell to R. Wolk
SX-18		License Agreement dated 3/12/70 between Hartmann Luggage Co. and Dayco Corp.
SX-19		Letter dated 9/26/85 from Stephen Lichtenstein to Keith Beecher
SX-20	(C)	Letter dated 10/15/85 from Keith Beecher to Larry Gitlin
SX-21	(C)	Letter dated 3/18/86 from Tom Leonard to Stephen Lichtenstein
SX-22		Letter dated 10/10/85 from Stephen Lichtenstein to Barry Shanbron with attached letter agreement
SX-23	(C)	Letter dated 2/21/86 from Stephen Lichtenstein to Daniel Bettinger

SX-24	Settlement Agreement dated 10/30/85 between Hartmann, J.C. Penney, and Halston Enterprises, Inc. signed by J.C. Penney and Hartmann
SX-25	Settlement Agreement dated 10/30/85 between Hartmann, J.C. Penney, and Halston Enterprises, Inc. signed by Halston and Hartmann
SX-26	Advertisement for Pegasus luggage
SX-27	Excerpt from the Best 1984-1985 Catalog depicting Wayfarer luggage
SX-28	Excerpt from the Service Merchandise 1984-1985 General Merchandise Catalog depicting First Flite luggage
SX-29 (C)	Hartmann Luggage Co.'s Report on Examination of Financial Statements and Additional Information for Eleven Months Ended December 31, 1982 and Years Ended January 31, 1981 and 1982
SX-30 (C)	Hartmann Luggage Co.'s Financial Statements and Additional Information, December 31, 1983
SX-31 (C)	Hartmann Luggage Co.'s Financial Statements and Additional Information, April 30, 1984
SX-32 (C)	Hartmann Luggage Co.'s Financial Statements and Additional Information, April 30, 1985
SX-33 (C)	Hartmann Luggage Co.'s Financial Statements and Additional Information, April 1986
SX-34 (C)	Hartmann's Economic Data Re. Units Ordered/Estimated Dollar Value for 1974 through 5/1/85
SX-35 (C)	Hartmann's Sales Data Re. its Luggage -- Series 4700, 4400, 4500, EC's, and PAC's
SX-36 (C)	List of Wannamaker's Purchases of A4 and A9, '84 vs. '85, and list of Wannamaker Invoices showing A4s, A9s from January 1986 forward (by month)
SX-37	Memo dated 9/4/85 from Bill Bostjanick to Bob McCornack with attached J.C. Penney invoice
SX-38 (C)	Hartmann Fashion and Trade-Up Merchandising Program
SX-39	Letter dated 9/11/86 from Dennis Purkiss to Jeffrey Gertler enclosing American Guard-it invoices of merchandise purchased from P.M.I. Enterprises

SX-40	Advertisement for Seward Luggage, 1969
SX-41	Advertisement for Seward Luggage, 1971
SX-42	Advertisement for Seward Luggage, 1975
SX-43	Hartmann-Dayco correspondence dated 1/17/75, 1/2/75, and 12/27/74
SX-44	Advertisements for Halston luggage crafted by Hartmann
SX-45	Survey of Confusion among Certain Luggage Products by Michael Rappeport, dated September 1986
SX-46 (C)	Marginal Counts (Rappeport Survey Data)
SX-47	Compilation of Advertisements (formerly, Exhibits RKX-3 through RKX-24 of respondent Kingport)

SPX-1 (C)*	Deposition of Ira Katz, dated 10/28/85
SPX-2	Hartman Tote Bag
SPX-3 (C)	Deposition of Dorothy Penix, dated 8/19/86
SPX-4 (C)	Deposition of Robert Davis, dated 8/18/86
SPX-5	Compilation of six catalogues formerly marked as: RKX-11, a 1984-1985 Best Catalogue; RKX-12, a 1983-1984 Best Catalogue; RKX-13, a W. Bell and Co. 1982 Catalogue; RKX-14, a McDade Company, Inc. 1982 Catalogue; RKX-22, a Service Merchandise 1983-1984 Catalogue; and RKX-23, a Service Merchandise 1984-1985 Catalogue

SRPX-1	Staff Rebuttal Exhibit List
SRPX-2 (C)**	Deposition of Ira Katz, dated 8/21/86
SRPX-3 (C)	Deposition of Michael Rappeport, dated 9/13/86
SRPX-4 (C)	Raw Interview Data from Rappeport Survey

* "SPX" denotes staff physical exhibits.

** "SRPX" denotes staff rebuttal physical exhibits

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CERTIFICATE OF SERVICE

I, Kenneth R. Mason, hereby certify that the attached (Public Version) Initial Determination was served upon Jeffrey L. Gertler, Esq., and Ethel L. Morgan, Esq., and upon the following parties via first class mail, and air mail where necessary, on June 19, 1987.

Kenneth R. Mason

Kenneth R. Mason, Secretary
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